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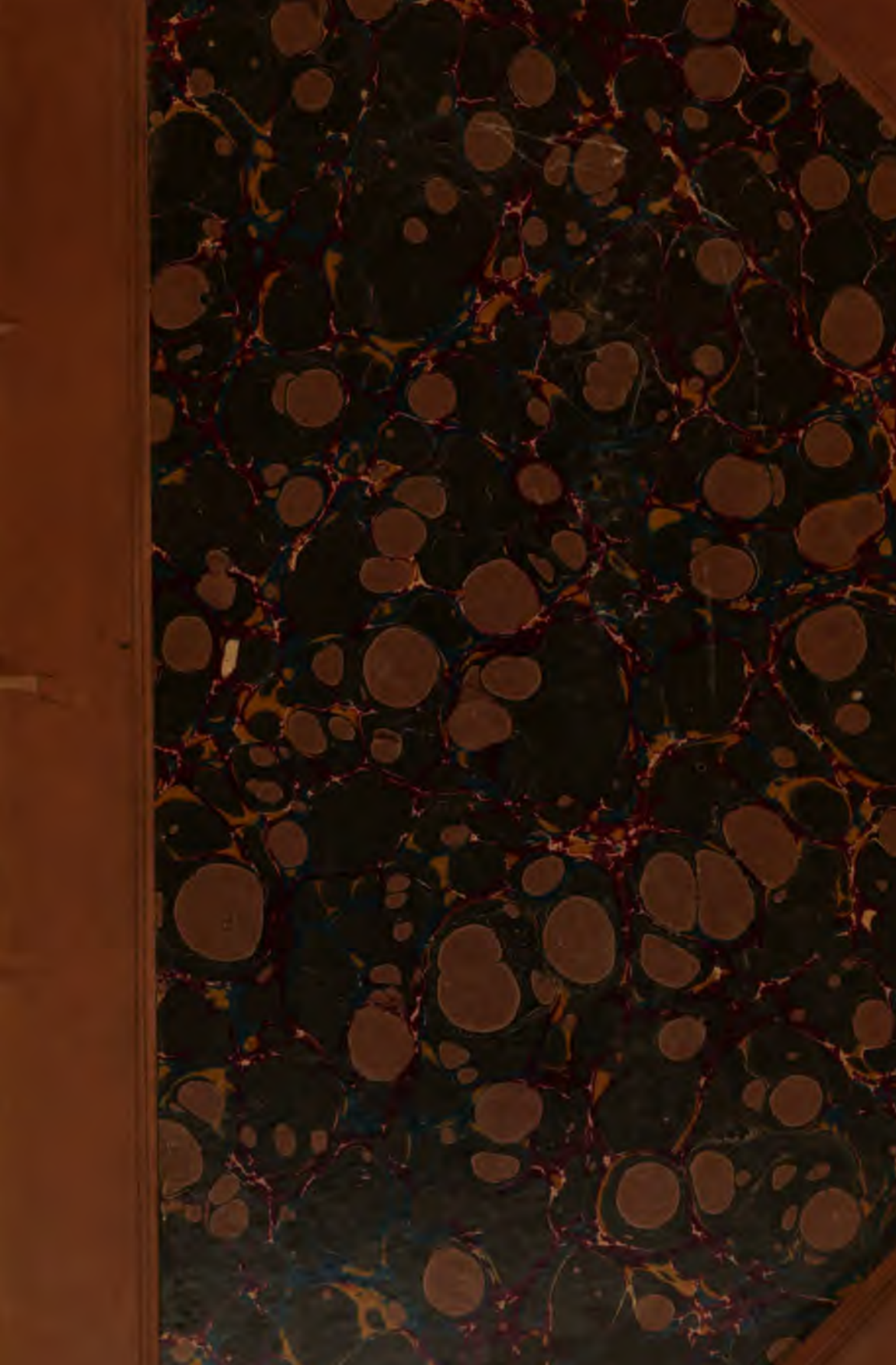

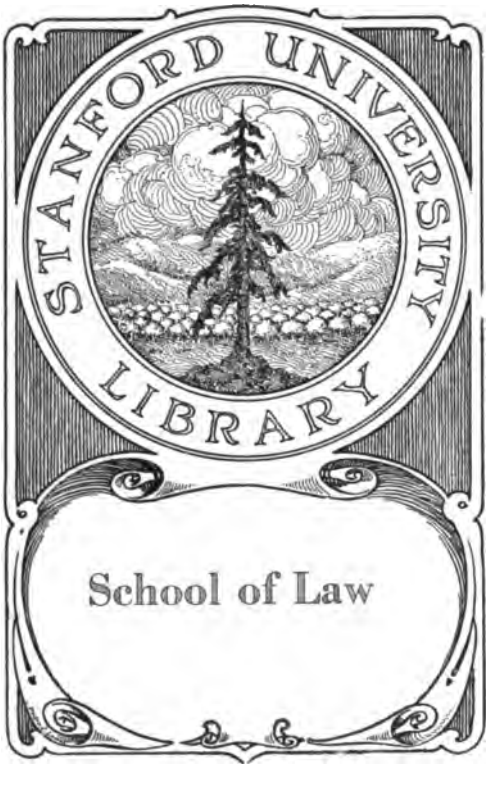

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UNDER the provisions of Consolidated Rule 211, Single Court Sittings for all the Divisions were to be held on Wednesday and Friday, and Chambers on Monday and Thursday in each week. The rule has been suspended until further notice. We observe, however, that the Judges of the Queen's Bench and Common Pleas Divisions, are taking steps in the direction of the suspended rule, by holding Court and Chambers on different days. This is a great convenience to practitioners, and we hope that the Judges may at their next meeting see their way clear to carry out the policy of the Judicature Act in assimilating the practice in the Common Law and Chancery Divisions, by bringing rule 211 into operation.

APROPOS of the recent appointments of Q.C.s, we have heard of a rather good story, which may give the Minister of Justice some further idea of his recent lists. We should be very grateful to him if the only objection to some of his favourites was that they never held a brief. A day or two after the recent appointments were announced, a solemn-visaged junior barrister appeared in the chambers of one of the new appointees with a brief in a County Court action, which he requested his friend to take; he declined it on the ground that he was too busy, and suggested that the solemn-faced visitor should take it himself, but he could not do it. "Why not, was it a difficult case?" "No, it was quite an easy one." "Was it a bad case?" "No, it was on the contrary quite a simple one, and sure to succeed." "Well, why on earth don't you take it yourself," said the gentleman about to walk in "silk attire." "Well, the fact is," said he of the solemn visage, "I don't care to ruin my chances of a silk gown by appearing in court."

SOME years ago the Law Society placed around part of the grounds connected with Osgoode Hall a handsome and costly iron fence. We are sorry to notice that this handsome and costly piece of work is gradually but surely rotting away from very gross and culpable neglect. A careful examination will show that many ornamental pieces of which it is composed, have been broken or rusted away, and that it is in lamentable need of repair, and a coat of paint. In the recent construction of asphalt walks we observe too that the gates of this fence have been embedded in the asphalt, a proceeding the wisdom of which we venture to doubt. It is true that in the ordinary state of affairs it is unnecessary to close

the gates, but should there ever hereafter be an occasion when it would be desirable to do so, as in the case of an *emeute*, all possibility of so doing is prevented. We do not know whether it is the Law Society or the Ontario Government, that is now charged with the care of the fence, but whoever has the responsibility seems at present to be neglecting the duty.

THE last Primary Examination of the Law Society was held on the 14th instant. In future, applicants for admission into the Society must be graduates in arts of any British University, or produce certificates of having passed the junior matriculation in any of the Universities of this Province. The Society is now building an addition for the benefit of the students, to the rear of the East wing of Osgoode Hall, and adjoining Examination Hall. The lower storey is to be used as a hat and cloak room. The second storey, on the level with the main floor will be used as a reading room, and the upper storey is to be divided into two consultation rooms, for the use of the profession. The cost will be a little over $2,000. The consultation rooms will supply a long felt want, and will enable the Librarian to enforce the regulations for the use of the library for the purposes for which it is intended, for reading and reference. It is now open at nights from 7 to 10.30. The attendance is not very large, averaging about ten each evening.

THE CROWN A CONSTITUENT PART OF THE PROVINCIAL LEGISLATURES.

It must be evident to every reader of the celebrated Queen's Counsel case of *Lenoir* v. *Ritchie*, 3 S.C.R. 575 (decided in 1879), that some of the learned judges of our Supreme Court who promulgated the heresy that the Crown formed no constituent part of the Legislature, had not fully considered the judgment of Lord Chancellor Cairns in *Theberge* v. *Landry*, 2 App. Cas. 102 (decided in 1876), in which the power of the Provincial Legislature of Quebec to legislate respecting the prerogative of the Crown was expressly reviewed. If the Crown formed no constituent part of the Provincial Legislature it must follow that none of its legislative acts could touch or in any way affect the prerogative; and it would, therefore, have been a waste of judicial time and learning for the Privy Council to have elaborated a judgment on that question. Not only did the Lord Chancellor review the question as to how far the prerogative was affected by the Provincial Act under appeal, but he committed the Judicial Committee of the Privy Council to a judgment which expressly declared the Provincial Statute to be "an Act which is assented to on the part of the Crown, *and to which the Crown is, therefore, a party*" (p. 108).

The Lord Chancellor's statement of the law would be meaningless, or illogical, unless the Judicial Committee had decided that the Crown formed a constituent part of the legislative authority of the province; and that the Lieutenant-

Governor was the Queen's representative in assenting to the Act "on the part of the Crown."

The judgment of the Privy Council is in harmony with the common law respecting the legislative prerogative of the Crown. "There is no Act of Parliament," says Sir Edward Coke, "but must have the Royal Assent of the King:" 4 Co. Inst. 24. "The Sovereign," says Sir William Blackstone, "is a constituent part of the supreme legislative power:" 1 Bl. Com. 261. "The making of statutes is by the King with the assent of Parliament:" Bacon's Abr. tit. Prerogative 487. "The King has the prerogative of giving his assent, as it is called, to such bills as his subjects, legally convened, may present to him, that is, of giving them the force and sanction of a law:" *Ibid.* 489.

In addition to the Crown's ordinary executive prerogatives, the sovereign, on the conquest and cession of Canada, acquired the prerogative power of legislation, which may be exercised in respect of conquered colonies with or without the assistance of the Imperial Parliament: 2 Peere Williams, 75. But on the grant of a representative assembly with the power of making laws, this separate prerogative could only be exercised with the advice and consent of the newly-created legislative authority: *Chapman* v. *Hall*, Cowper 204.

The Constitutional Acts of 1791 and 1840, which created the legislative powers over what are now Ontario and Quebec, and authorized them to make laws with reference to the classes of subjects, some of which are now within the legislative authority of the provinces, expressly provided that the Provincial laws of Upper and Lower Canada should be made by "His Majesty," and those of Canada by "Her Majesty," by and with the advice and consent of the other legislative bodies created by the Acts.

The Constitutional Act of 1791 (31 Geo. III. c. 31), after providing that there should be a Legislative Council and Assembly in each of the Provinces of Upper and Lower Canada, enacted that, "In each of the said provinces respectively, His Majesty, his heirs or successors, shall have power during the continuance of this Act, by and with the advice and consent of the Legislative Council and Assembly of such Provinces respectively to make laws for the peace, welfare, and good government thereof" (s. 2).

The Imperial Act further authorized the enactment of special laws on the following classes of subjects now within the legislative authority of the Provinces, viz.: Elections (ss. 15, 16, 18, 23 and 25); Courts of Civil Jurisdiction (s. 34); Tithes (s. 35); Clergy Reserves and Rectories (ss. 41 and 42); and Tenure of Lands in Free and Common Socage (s. 43). And it provided that, in each case, the legislation should be by an "Act of the Legislative Council and Assembly of the Province, assented to by His Majesty, his heirs or successors."

The Union Act of 1840 (3 and 4 Vic. c. 35) repealed only so much of the Act of 1791 as related to the Legislative Council and Assembly, and the making of laws by the Provinces; united them into one Province; and provided that within the united Province "Her Majesty shall have power by and with the advice and consent of the Legislative Council and Assembly to make laws for the peace, welfare, and good government of the Province of Canada." The Act describes the new

legislative authority as "the Legislature of the Province of Canada," and uses the term, "Act of the Legislature of the Province of Canada" (ss. 23, 24, 28, etc.), which, by s. 61, is defined to mean "An Act of Her Majesty, her heirs or successors, enacted by Her Majesty, or by the Governor, on behalf of Her Majesty, with the advice and consent of the Legislative Council and Assembly of the Province of Canada."

It will be seen that the two Imperial Acts above cited expressly made the Crown a constituent part of the former Provincial Legislatures.

Such were the constitutional provisions respecting the legislative prerogative of the Crown, in what is now Ontario, when the B.N.A. Act was passed. By that Act two legislative bodies were established, one the Parliament of Canada, "consisting of the Queen, an Upper House styled the Senate, and the House of Commons;" the other, the Provincial Legislatures, which, in Ontario, was described as consisting of the Lieutenant-Governor and the Legislative Assembly. And it has been from this short description of the legislative authority of the Province that some learned judges have contended in *obiter dicta* that the Crown is no constituent part of the Provincial Legislature.

There are three answers to this contention: (1) The common law of the prerogative of the Crown in legislation; (2) The prior Imperial legislation which distinctly affirmed and made that prerogative of the Crown essential in Provincial legislation; (3) The express continuation of that prerogative in provincial legislation by the B.N.A. Act. We have already amplified the propositions referred to in first and second of these answers, and shall now proceed to consider the third.

The B.N.A. Act by s. 129 continued the Imperial and Provincial laws then in force in the provinces in these words: "Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia and New Brunswick, at the Union . . . . . shall continue in *Ontario*, Quebec, Nova Scotia and New Brunswick respectively as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by, or exist under, Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective province, according to the authority of the Parliament or of that Legislature under this Act."

It will be noticed that the only repeal of the then existing laws is contained in the words, "Except as otherwise provided by this Act;" so that where the B.N.A. Act did not "otherwise provide," the prior Imperial and Provincial laws were continued and retained their legislative power. There is nothing in the B.N.A. Act taking away the prerogative of the Crown, or its power of legislation, as given by the prior Imperial Acts over the territory or the classes of subjects assigned to the provinces. On the contrary it must be conceded that the legal effect of the 129th section is to re-enact in the new Provinces of Ontario and Quebec so much of the provisions of the Union Act of 1840, as made and recognized the Crown a constituent part of the legislative power of old Canada. And turning to the Provincial Acts enacted under these Imperial Acts one, C.S.C. c. 5, was

"in force in Canada" and was likewise made applicable to Ontario and Quebec, and which enacted that the following words, indicating the authority by which Provincial Statutes were passed, should continue to be used: "Her Majesty by and with the advice and consent" of the other legislative bodies, enacts, etc.

We have already shown that it is one of the prerogatives of the Crown to enact all laws by and with the advice and consent of the other legislative bodies, especially the laws which may be classed as regal or supreme, such as relate to the property and civil rights of the subjects of the Crown; the establishment of superior courts of civil and criminal jurisdiction; the right of eminent domain; the establishment of local or municipal authorities with powers of taxation; and to the general executive government of the province. And this legislative prerogative of the Crown, as well as those which are classed as executive prerogatives, it is well known cannot be taken from the Crown unless by express words, or by terms which make the inference irresistible. In giving judgment on the Quebec Election Act in *Theberge* v. *Landry* (*supra*) the Lord Chancellor, referring to the contention that the Act did not take away any prerogative right of the Crown. because the Crown and the prerogative of the Crown were not specially or particularly mentioned in the Act, said: "Their lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle that the prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as often as has been held before, that *in any case where the prerogative of the Crown has existed* precise words must be shown to take away that prerogative."

Not only did the Privy Council in that case affirm that the Crown was a constituent part of the Provincial Legislature, but in *Hodge* v. *Reg.* 9 App. Cas. 117, the same judicial body thus described the jurisdiction and powers of the Legislature of Ontario:

"When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province, and for provincial purposes in relation to the matters enumerated in s. 92, it conferred powers, not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample, within the limits prescribed by s. 92, as the Imperial Parliament in the plentitude of its power possessed and could bestow. Within these limits of subjects and area the Local Legislature is supreme and has the same authority as the Imperial Parliament, or the Parliament of the Dominion would have had under like circumstances."

It may be noticed that the constitution of the Legislatures of Nova Scotia and New Brunswick was continued by the B.N.A. Act as it existed at the Union; and no one has contended that prior to Confederation the Crown formed no constituent part of their Legislatures. There was, therefore, in the prior Provincial Constitutions of the separate provinces, a recognition of the legislative function of the Crown, and it may have been considered appropriate when establishing a new legislative body for the collective provinces as a united Dominion, to

name the Crown as a constituent part of the new legislative authority then called into existence as the Parliament of the Dominion of Canada.

By s. 90 of the B.N.A. Act, s. 56 is altered and made applicable to the provinces, and may be read as follows: "Where the Lieutenant-Governor assents to a Bill in the Governor-General's name, he shall by the first convenient opportunity send an authentic copy of the Act to the Governor-General; and if the Governor-General-in-Council within one year after the receipt thereof by the Governor-General thinks fit to disallow the Act, such disallowance (with a certificate of the Governor-General of the day on which the Act was received by him) being signified by the Lieutenant-Governor, by speech or message [to each of the Houses of the Parliament], or by proclamation, shall annul the Act from and after the day of such signification."

This suggests the question: If the Lieutenant-Governor is a constituent part of the Provincial Legislature why should he assent to a bill "in the Governor-General's name," for in no part of the B.N.A. Act is the Governor-General made a constituent part of a Provincial Legislature? This reference to the Governor-General must obviously be read by the interpretation which the B.N.A. Act gives in s. 10: "The provisions of this Act referring to the Governor-General extend and apply to the Governor-General for the time being of Canada, or other the Chief Executive Officer or Administrator for the time being, *carrying on the Government of Canada on behalf and in the name of the Queen*, by whatever title he is designated."

Reading these two sections together it would appear that when the Lieutenant-Governor assents to a Bill he does so in the name of the Governor-General as "carrying on the Government of Canada on behalf and *in the name of the Queen*." The Governor-General by the Confederation Act has only delegated or representative functions in legislation; so that it must follow that the Lieutenant-Governor's assent to provincial legislation must, therefore, be "in the name of the Queen;" and that the legislative prerogative of the Crown in the Provincial Legislatures has not been abrogated by the B.N.A. Act.

Since the above was written we learn that a late judgment of the Supreme Court has affirmed by a majority of Judges that the Crown forms a part of the executive government of the provinces; but as we have not yet seen the text of the judgment delivered, we are unable to say how far the arguments we have advanced as to the legislative prerogative are in harmony with the opinions of the majority of the Court on the executive prerogative of the Crown in the Provinces.

Our argument may be closed by an extract from a recognized text book on Constitutional Law: "No Acts of Colonial Legislatures have force until they have received either the assent of the Governor in the Queen's name, or the Royal assent when reserved and transmitted for consideration:" Cox's British Commonwealth, 525.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for December comprise 23 Q.B.D., pp. 489-632; 14 P.D., pp. 175-9; 42 Chy.D., pp. 321-696; and 14 App. Cas., pp. 337-664.

MUNICIPAL CORPORATION—CONTRACT OF, HOW FAR BINDING ON—APPLICATION OF RATES—IMPOSITION OF RATES—ULTRA VIRES.

In *The Attorney-General* v. *Newcastle*, 23 Q.B.D., 492, several important principles of law relating to municipal corporations are laid down by the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) In the first place we may deduce from this case, that the power of a municipality to levy rates is strictly limited by the terms of the statute by which that power is conferred; and that where rates are authorized to be levied for a specified purpose, they cannot legally be applied to any other purpose; that where the surplus rates are authorized to be expended in a particular way, rates may not legally be levied for the purpose of creating a surplus; that when a municipal corporation has entered into a contract absolutely and unconditionally to pay a sum of money, it must nevertheless be treated as binding on the corporation only so far as it can legally bind itself to pay, and no further; that payments which are authorized by statute to be made out of one fund, cannot by the unconditional contract of the corporation be made payable out of any other, even though judgment be recovered against the corporation on such a contract; that a municipal corporation may be restrained by injunction from applying the rates levied to other purposes than those to which by statute they are authorized to be applied.

NEGLIGENCE—MASTER AND SERVANT—COMMON EMPLOYMENT—CONTRACTOR AND SUB-CONTRACTOR.

Johnson v. *Lindsay*, 23 Q.B.D., 508, is one of the few cases in which the spectacle is presented of a division of opinion among the learned Judges of the Court of Appeal. The action was brought to recover damages for the negligence of the defendant's servant under the following circumstances: Higgs & Hill, by whom the plaintiff was employed as a workman, contracted for the whole work of improving and altering certain dwelling houses, under the supervision of an architect. A certain portion of this work was of a special and definite kind, viz., the laying of a fire-proof roofing, and was to be done under a special clause in the contract by a person to be selected by the architect. Higgs & Hill were to pay the person so employed, and were to allow the use of their scaffolding and to provide any needful attendants for the carrying out of the work, and to work with him as might be necessary for the due despatch of the work; and the work was to be carried out in accordance with a specification to be forwarded by the architect to Higgs & Hill. The architect secured the defendants to do the roofing, and it was in consequence of the negligence of a servant of theirs that the plaintiff was injured. Cotton and Lopes, L.JJ., were of opinion that the defendants were sub-contractors of Higgs & Hill, and that, therefore, they and their workmen must be taken to have been in the employ of Higgs & Hill; that the man who caused the injury was, therefore, under a common master, and

engaged in a common employment, and, therefore, the action could not be maintained. But Fry, L.J., considered that the defendants were independent contractors; but even if they were sub-contractors their workmen were not in the service of Higgs & Hill, and that the man who caused the injury was not under a common master with the plaintiff, although they were engaged in a common employment, and, therefore, in his opinion, the defendants were liable.

PRACTICE—SERVICE OF WRIT—FOREIGN CORPORATION CARRYING ON BUSINESS IN ENGLAND—ORD. 9, R. 8 (ONT. RULES 267, 268).

In *Haggin* v. *Comptoir D'Escompte de Paris*, 23 Q.B.D., 519, the Court of Appeal (Cotton, Fry, and Lopes, L.JJ.) held, following *Newby* v. *Van Oppen*, L. R., 7 Q.B., 293, that a foreign corporation carrying on business in England is liable to be sued in an English Court, and may be served with a writ of summons in the same manner as an English corporation aggregate; and that service of the writ on the head officer at the place of business in England of a foreign corporation was good service on corporation under Ord. 9, r. 8 (See Ont. Rules 267, 268.)

PRACTICE—SERVICE OF WRIT—FOREIGN PARTNERSHIP CARRYING ON BUSINESS IN ENGLAND—ORD. 9, R. 6

On the authority of the last case an attempt was made in *Russell* v. *Cambefort*, 23 Q.B.D., 526, to induce the Court of Appeal to uphold the service of a writ of summons made on the manager of the business of a foreign partnership carried on in England, as good service on the firm; but this the Court of Appeal (Cotton, Fry and Lopes, L.JJ.) declined to do. The Court distinguished the two cases on the ground that while a foreign corporation may be said to reside in a country where it carries on business, the members of a private partnership cannot be considered as resident in the country simply because they carry on business in it. The decision in *O'Neil* v. *Clason*, 46 L.J.Q.B., 191, was overruled, and the decision of Field and Cave, JJ., refusing to set aside the service of a writ so made, was reversed.

MUNICIPAL OFFICER—ACCEPTANCE OF FEE OR REWARD UNDER COLOUR OF OFFICE—ALLOWANCE IN ADDITION TO SALARY.

Edwards v. *Salmon*, 23 Q.B.D., 531, was an action to recover a penalty on the ground that the defendant, being a municipal officer, had contravened a statute by accepting under colour of his office a fee or reward in addition to his salary. The facts were that the council of a borough, being also the local sanitary authority under the Public Health Act, appointed the defendant, a solicitor and the town clerk of the borough, to be clerk to the sanitary authority; and by a resolution of the council the defendant's salary was fixed at a certain sum, "to include all legal charges except for contentious business matters, travelling expenses and payments out of pocket." Subsequently the council, as local sanitary authority, promoted a sewage scheme, which had not been contemplated when the defendant's salary was fixed, and in connection with this scheme the defendant did work, partly in respect of contentious and partly in respect of non-conten-

tious business. On the completion of the sewage works the council passed a resolution that the defendant be paid a sum of money for his services in connection with the scheme, which was duly paid, and which was the payment impeached. The Court of Appeal (Lord Halsbury, L.C., Lord Esher, M.R., and Lindley, L.J.) affirmed the judgment of Pollock, B., dismissing the action.

BILL OF SALE—CHATTELS—DESCRIPTION—AFTER ACQUIRED PROPERTY.

Perhaps the only points of interest here, in *Carpenter* v. *Deen*, 23 Q.B.D. 566, are those relating to the sufficiency of the description of chattels in a bill of sale. The chattels were described in a schedule annexed to the bill of sale in question, as "twenty-one milch cows" on a farm belonging to the grantor, "and all goods, chattels, and effects in or upon the premises, belonging to" the grantor. After the execution of the bill of sale the grantor sold several of the cows referred to in the bill of sale, and bought others. It was held by the Court of Appeal (Cotton, Fry and Lopes L.JJ.) affirming a judgment of Charles, J., that there being no covenant express, or implied, affecting after acquired property, the bill of sale did not extend to any of the stock brought on to the farm after the date of the bill of sale; and further (reversing Charles J.) Lopes, L.J., dissenting, that the description "twenty-one milch cows" was not sufficiently specific to satisfy the requirements of the Bills of Sales Act, 1878.

CONSPIRACY—COMBINATION OF SHIP OWNERS TO KEEP UP FREIGHT—ENGROSSING PARTICULAR TRADE—EXCLUDING RIVAL TRADERS FROM COMBINATION.

The *Mogul Steamship Co.* v. *McGregor*, 23 Q.B.D. 598, is an appeal from the decision of Lord Coleridge, C.J., 21 Q.B.D. 544, noted *ante* Vol. 25, p. 10. It may be remembered that the action was brought to recover damages on the grounds that the defendants, who were ship owners, engaged in the China trade, had combined together with a view of keeping up a monopoly of the trade, from a certain Chinese port, and offered to merchants and shippers in China who shipped their goods exclusively in vessels belonging to the defendants a rebate of 5% on all freights paid by them, and the defendants offered to furnish steamers, when necessary, to underbid any competing vessels, which should come in to the port in question. The plaintiffs, who were rival ship owners, were excluded from association, and in consequence of such exclusion claimed to have suffered damage. Lord Coleridge, C.J., not without some doubt, dismissed the action, and his decision has now been affirmed by the Court of Appeal (Bowen and Fry, L.JJ.; Lord Esher, M.R., dissenting), on the ground that the association, having been formed for keeping the trade in their own hands, and not from any personal malice or ill-will to the plaintiffs, was not unlawful. With Lord Coleridge, C.J., doubting, and Lord Esher dissenting, it would be unsafe to predict what will be the ultimate issue of the action in the House of Lords.

CONFLICT OF LAWS—LEX LOCI CONTRACTUS—INTENTION OF PARTIES—CLAUSE IN CONTRACT VOID BY LAW OF THE COUNTRY OF THE CONTRACT—SHIP—BILL OF LADING—LAW OF THE FLAG.

In re Missouri Steamship Co., 42 Chy.D. 321, a somewhat novel point in the law of contracts was raised. A contract was made by the claimant, a citizen of

the United States, at Boston, Mass., with a British Company of ship-owners, to carry cattle from Boston to England, in a British ship. The contract contained a clause that the company should not be liable for the negligence of the master or crew of the ship. Such a clause is invalid according to the law of Massachusetts, as being against public policy. The cattle were lost in consequence of the negligence of the master and crew, and the shipper claimed against the company for the loss. The question therefore was whether the clause in the contract, which was void, according to the law of Massachusetts, could nevertheless be relied on in an English court as a defence to the action. Chitty, J., held that it could; and the Court of Appeal (Lord Halsbury, L.C., and Cotton and Fry, L.JJ.) affirmed his decision, on the ground that from the circumstances surrounding the contract, it being a contract with an English Company, to carry goods in a British ship, and the bills of lading being in English form, it must be presumed that the parties intended to be bound by the English law.

COMPANY—WINDING UP—ARREARS OF RENT CHARGE—LAND IN POSSESSION OF LIQUIDATORS.

In re Blackburn Benefit Building Society, 42 Chy.D. 343, is an appeal from a decision of the Vice-Chancellor of Lancaster, disallowing a claim for arrears of rent charge, preferred against a company in course of being wound up. At the time of the winding-up order, the company was in possession of land as mortgagees, the land being subject to a rent charge created by deed. The liquidators for some time paid the rent charge, but finding the annual value of the property was not equal to the rent charge, they obtained from the court leave to get rid of the property, and thereupon gave notice to the tenant in occupation of the land, and to the owner of the rent charge, that they repudiated the land. The owner of the rent charge claimed the right to prove in the winding up, for arrears which had accrued since the repudiation. But the Court of Appeal (Lord Esher, M.R., and Cotton and Fry, L.JJ.) held that the liability of the company for the rent charge arose not out of contract, but out of privity of estate, and that upon repudiation of the estate by the liquidators the liability ceased; and they therefore affirmed the decision of the Vice-Chancellor.

TRUSTEE—INVESTMENT OF TRUST MONEY—NEGLIGENCE—LIABILITY OF TRUSTEE FOR IMPROPER INVESTMENT—APPEAL—SERVICE ON THIRD PARTY.

In re Solmon Priest v. *Uppleby*, 42 Chy.D. 351, the Court of Appeal (Lord Esher, M.R., and Cotton and Fry, L.JJ.) determined that where a trustee negligently invests the trust moneys in a security authorized by a trust, but of insufficient value, upon the appointment of new trustees in his place, the new trustees are entitled to realise the security without notice to the trustee who made the investment, and that the latter is liable for the deficiency. On this point overruling Kekewich, J., who was of opinion that in such a case the trustee who made the investment is entitled to the option of taking the security, and that it having been realized without notice to him he was relieved from liability. In the appeal a question of practice arose. The defendant took the preliminary objection that the plaintiff had not served third parties from whom the defendant

claimed indemnity with notice of the appeal. The majority of Court of Appeal (Lord Esher, M.R., and Fry, L.J.) held that the plaintiff was not obliged to do this, but that it was the duty of the defendant to apply to the court for leave to serve the third parties with notice; from this, however, Cotton, L.J., dissented, being of the opinion that as the third parties had obtained leave to appear at the trial, the plaintiff should have notified them of the appeal.

PRACTICE—ADVERSE PARTY CALLED AS A WITNESS—RIGHT TO CROSS-EXAMINE.

In *Price* v. *Manning*, 42 Chy.D. 372, a party to the action called his opponent as a witness, and then on re-examination proposed to cross-examine him as an hostile witness, this Kay, J., refused to allow; and on appeal, Cotton, Fry, and Lopes, L.JJ., held that it was in the discretion of the judge at the trial to permit it or not, according as it should appear to him, whether or not the witness showed himself so hostile as to justify his cross-examination.

VENDOR AND PURCHASER—CONDITIONS OF SALE—RIGHT TO RESCIND—UNWILLINGNESS TO COMPLY WITH REQUISITIONS.

In re Starr Bowkett Building Society and Sibun, 42 Chy.D. 375, was an application under the Vendor and Purchaser's Act, in which the question was as to the right of the vendors to rescind the contract. The land had been sold subject to a condition that if the purchaser should "make any objection to, or requisition on, the title" which the vendors should be "unable or unwilling to remove or comply with," the vendors might, by notice in writing, cancel the contract. Requisitions were sent in, and thereupon the vendors, who were trustees passed a resolution that as some of the requisitions could not be complied with, and others would cause great trouble and expense, notice should be given to rescind the contract, and notice was given accordingly. Chitty, J., held that the vendors were not bound to state their reasons for rescinding, and though the word "unwilling" ought to be interpreted "reasonably unwilling," yet on a general statement by the vendors that the rescision was *bona fide*, and in the absence of any evidence of caprice or *mala fides*, the Court ought not to infer that the vendors were acting unreasonably, the vendors were justified therefore in rescinding, and the contract had been annulled; and this decision was affirmed by the Court of Appeal (Cotton, Fry, and Lopes, L.JJ.)

INJUNCTION—PAST INFRINGEMENT OF PATENT—INTENTION TO INFRINGE.

Proctor v. *Bailey*, 42 Chy.D. 390, is one of those cases which shows that an injunction is not to be granted to restrain an infringement of patent, unless there is really a foundation for believing that an infringement is contemplated. In this case, one Bennis set up four machines in the defendant's premises, in August, 1882, to be taken and paid for if they worked satisfactorily. They were used until April, 1883, when the defendant, being dissatisfied with them, took them down, and laid them in his yard, and called on Bennis to take them away, and never used them again. Bennis did not remove them till January, 1885. In March, 1887, Proctor (the plaintiff in the present case), who had obtained judgment

against Bennis, that the latter's machines were an infringement of Proctor's patent, claimed royalties from the defendant, and the defendant replied that he could satisfy himself by calling at his mill that the defendant was using neither the plaintiff's nor Bennis' machines. Further correspondence took place, the defendant denying all liability, and alleging that he had not bought the machines from Bennis, who had set them up on trial, and as they did not work well had to take them down, and that the defendant was not using and did not intend using any machine infringing the plaintiff's patent. In January, 1888, the plaintiff brought his action, claiming an injunction, and claiming damages. The defendant defence denied infringement, and stated that if he ever had used machines infringing the patent he had long since, as the plaintiff knew, discontinued doing so, and did not threaten or intend to use any apparatus infringing the patent. The Vice-Chancellor on these facts granted an injunction and an inquiry as to damages, but on appeal the Court of Appeal (Cotton, Fry and Lopes, L.JJ.) were of opinion that though the defendant had infringed it was not to be inferred from the circumstances that the defendant had any intention to infringe the patent again, and therefore the injunction ought not to have been granted, and, as the County Palatine Court had only the old jurisdiction of the Court of Chancery, damages could not be given; but the defendant was refused his costs except of the appeal, on the ground that he had not before action given full information.

COMPANY—WINDING UP—DEBENTURE HOLDERS—RECEIVER APPOINTED BY DEBENTURE HOLDERS—DISCRETION OF COURT.

In re Pound, 42 Chy.D. 402, the debenture holders of a company in process of being wound up, under the powers contained in their debenture deed, appointed a receiver to manage and dispose of the undertaking and property of the company, and applied to the Court for an order empowering the receiver to take possession of the property of the company, notwithstanding the appointment of a liquidator in the winding up proceedings. Kay, J., refused the application, but the Court of Appeal (Cotton, Fry and Lopes, L.JJ.) were of opinion that the Court ought not to interfere with the right of the debenture holders to a receiver under their deed, and gave leave to the receiver appointed by them to take possession, but without prejudice to any question as to the powers of the receiver, other than the power to take possession and sell the property.

SOLICITOR AND CLIENT—COSTS—TAXATION BETWEEN SOLICITOR AND CLIENT—LIEN.

Curwen v. *Milburn*, 42 Chy.D. 424, was an action by a client against his solicitor to recover possession of documents on which the solicitor claimed a lien for costs. Prior to action the plaintiff's solicitors wrote to the defendant saying "our client only requires you to deliver particulars of any unsettled bill of costs you may have against him." After action brought an order was made for the delivery of bills, and a reference for taxation was directed. Liberty was given to the plaintiff to pay £350 into Court, and upon doing so his documents were to be given up. On the taxation the taxing officer struck off certain items

(without considering their propriety) on the ground that having regard to their dates they were barred by the Statute of Limitations. On an application to review the taxation, North, J., held that the letter of the plaintiff's solicitors amounted to a sufficient acknowledgment to take the case out of the statute, and therefore the items ought not to have been struck out; and on appeal the Court of Appeal, without considering that question, were of opinion that the object of the order for taxation was to ascertain the amount of costs for which the defendant had a lien, and in that view also the taxing officer was wrong.

COMPANY—PROSPECTUS—FRAUD—DECEIT.

Glasier v. *Rolls*, 42 Chy.D. 436, was an action similar to *Peek* v. *Derry*, or *Peek* v. *Gurney*, in which the plaintiffs claimed to recover damages against a director for alleged misstatements in the prospectus of a company, by reason of which they were induced to become shareholders. The defendant was the principal partner in a trading firm which was converted into a limited company, and the prospectus issued with his knowledge and concurrence described him as managing director, but with a note stating that he would not join the board until the transfer of the business to the company had been completed. The prospectus stated that the profits previously realized had been 17% on the capital employed in it. This would be true if capital employed did not include the business premises, or only included their value less the mortgages thereon, but was grossly untrue if the whole value of the business premises was taken as part of the capital. Kekewich, J., held the defendant liable, but the Court of Appeal (Cotton, Fry and Lopes, L.JJ.) thought there was not evidence of any dishonesty in making the representation, and that therefore although it were untrue, under the decision in *Peek* v. *Gurney*, 14 App. Cas. 337, in the House of Lords, the action would not lie.

PATENT—EXCLUSIVE LICENSE FOR LIMITED TIME AND AREA—LICENSEE'S RIGHT TO SUE IN HIS OWN NAME.

In *Heap* v. *Hartley*, 42 Chy.D. 461, the Court of Appeal (Cotton, Fry and Lopes, L.JJ.) held on appeal from the Vice-Chancellor of Lancaster, that an exclusive licensee for a limited time and area of a patented article is not entitled to sue in his own name without joining the patentee, in order to restrain the user by a defendant, within the licensed district of any of the patented articles bought by him outside of the district, because the license was merely a permission to do lawfully what would otherwise be unlawful, and was not equivalent to a grant.

PRACTICE—STAYING EXECUTION UNDER JUDGMENT.

Tuck v. *Southern Counties' Bank*, 42 Chy.D. 473, need only be noticed for the point of practice it contains. Kay, J., having laid it down therein that an application to stay execution under a judgment, unless it is made immediately after the judgment has been pronounced, must be supported by an affidavit showing the special circumstances on which the applicant relies.

Proceedings of Law Societies.

HAMILTON LAW ASSOCIATION.

The Trustees beg to present their tenth annual report, being for the year 1889.

The number of members at the date of the last report was 69, four new members have been added, namely: John G. Gauld, Stuart Livingstone, E. H. Ambrose, and W. S. McBrayne, and the present membership is 70.

The annual fees to the amount of $325 have been paid.

The number of volumes in the Library is about 2171, of which, 200 were added during the year. The following periodicals are received, namely:

The Law Times (English)
The "Times" Law Reports.
The Solicitors' Journal.
The Albany Law Journal.
THE CANADA LAW JOURNAL.
The Canadian Law Times.

The Treasurer's report is submitted herewith, giving a detailed statement of the receipts and expenditure, and of the assets and liabilities of the Association, and the same is also in the form required by the Law Society.

The Trustees have much pleasure in announcing that they have completed the English Reports, by the purchase of the Admiralty and Ecclesiastical Reports and the addition of some other needed volumes; these are now on the shelves, and your Association has a Library second only to that at Osgoode Hall, and will hereafter be able to devote more funds to the purchase of Text Books from time to time, and of such other books as may seem useful.

The report of the Inspector of County Libraries was most favourable, so far as your Association was concerned, and much credit is due to Miss Counsell, the Librarian, for the manner in which she has discharged her duties.

The Law School is now in active operation, and appears to be working well. No definite opinion can be formed at present of the results which will be attained, but it should receive the support of the whole profession in its endeavor to provide for the better training of those who wish to join our ranks.

We would recommend that a committee on Legislation be appointed for the coming year; the Bills of Exchange Act will, it is understood, be again introduced in the Dominion House, and other Legislation may be expected in the Provincial Legislature and the attention of the Profession might be beneficially directed towards such Bills as are from time to time brought before Parliament in which they are more particularly interested, we have no doubt, that if the Associations throughout the country considered legislation more carefully, it would result in fewer amendments being made to the existing Law.

No action has yet been taken to carry out the suggestion of the Joint

Committee of Law Associations that application to strike out a Jury Notice shall be determined before the action is entered for trial.

The complete fusion of Law and Equity is hampered by the distribution of business in Court and Chambers, and the continued existence of separate sittings at Osgoode Hall, for the transaction of the matters belonging to the several divisions; greater unity of practice would be attained, if all business could be disposed of by any Judge without reference to the particular division in which the action is brought.

The Devolution of Estates Act has a much wider scope than was at first supposed, and it is suggested that authority should be conferred on the proper officers in the outer counties, to act in these matters without the intervention of the Official Guardian and so as to dispense with the necessity of any application to the Court at Toronto, in what is at most an administration proceeding. Your Trustees consider these matters of vital importance to the Profession, and would suggest the desirability of legislation to carry them into effect. No doubt, with the co-operation of the Associations throughout the country, much might be effected.

EDWARD MARTIN, President.

E. E. KITTSON, Secretary.

Hamilton, 2nd January, 1890.

Reviews and Notices of Books.

The History of Canada. By WILLIAM KINGSFORD, LL. D. Vol. III. With Maps. Toronto: Rowsell & Hutchison. London: Trubner & Co., 1889.

We have been favored with copy of the work, of which the title forms the heading of this article, and though our journal is not a literary review, nor the work in question a legal essay or report, it is one so deeply interesting to all Canadians, and to lawyers certainly not less than others, as a record of events which have made Canada what it is, that we feel bound to call the attention of our readers to it, and to give such brief account of it as we did of the two volumes which preceded it.

We were at first rather disappointed to find that this volume does not bring the history down to the conquest; but Mr. Kingsford in his brief and modest preface, explains that he not only found it impossible to fulfil his intention of bringing it down to that period, but also, that although the capture of Quebec might be virtually considered the termination of French rule in Canada, yet the events between that capture and the final cession of the country, under the treaty of Paris, in February, 1763, formed so important a part of its history that his work could not have been considered complete unless it included them; and that an account of these events and those prior to the conquest and not included in the present volume, would of themselves fill a fourth, on which he is now occupied, and which he hopes to publish in September, 1890. Among the

events so referred to are Levis' attack on Quebec, with Murray's defeat in May, and the capitulation of Montreal in September, 1760, followed in 1763 by the treaty of Paris, while among the subjects indispensable to the completion of his work and included with others in the present volume, are the history of Hudson Bay up to its cession under the treaty of Utrecht; a summary account of the settlement of Louisiana in its relationship to Canada; and the events in Acadia after its cession under the treaty of Utrecht, including the creation of the Province of Nova Scotia, and the foundation of the city of Halifax; the capture and subsequent restoration of Louisburg; the capture of Port Royal (now Annapolis); the fruitless expedition of the Duc d' Anville; the suffering and surprise of the New England troops by Coulon de Villiers in Acadia; De la Verendrye's explorations; the character of de la Galissouiere; de Celoron's expedition up the Ohio; the founding of Ogdensburg, by Picquet; the character and intrigues of LeLoutre; the Marquis Duquesne's expedition to the Ohio; Braddock's expedition against Fort Duquesne, his defeat and death; Dieskau's expedition on the west side of Lake Champlain; the extraordinary ecelesiastical quarrel at Quebec in 1727; the state of Canada and Canadian society in 1755-6.

This volume contains 578 pages, divided into 5 books, each again divided into chapters. It is very handsomely and clearly printed, the type and paper are good; and it is altogether got up in the best modern style. It has a very full table of contents; four small but very useful maps; many explanatory notes, and full references to the authorities for the statements of fact, and in many cases, citation of important passages from documents referred to. There is no verbal index to persons and events, but Mr. Kingsford promises that a very full one shall be given with the fourth volume to it, and the three preceding it. Its style is clear without attempts at oratorical flourishes and effects; and we hold with respect to this volume, the same conviction of the author's conscientious fidelity, care and labour in collecting and verifying the facts he relates, the impartiality of the inferences he draws from them, and his characterizations of the personages whose acts he records, which we have expressed as to the preceding volumes, and as an instance of his fairness, we give his character of Rasle, a Jesuit of the Jesuits, a body for whom Mr. Kingsford has as little love as we have:

"In spite of Rasle's persevering hostility to New England and his never-ceasing attempts to embroil England and France in war, for a small extent of border territory which to-day is but imperfectly settled, he demands our sympathy from the high qualities he possessed. Had he been placed in a wider field of action where his energy could have been exercised, and by experience and contact with the world he could have learned to overcome his prejudices, he might have been remembered in history by the side of Richelieu, Mazarin or Alberoni. Great powers always command respect, especially when allied with those brilliant traits of character which impress us by their physical, rather than by their moral, force. To Rasle's high ability he added unfaltering courage and self-reliance; and it was by no means in disaccord with his character that he refused to give or take quarter. In his young years he had been an earnest

student of polite literature. At the Jesuit's College he had been distinguished by great application. He was an elegant Latin scholar throughout his life, and he had been a missionary for many years, living with savages, he retained these tastes. He had obtained a perfect knowledge of Abenaki, and had attempted to give it some grammatical form. He had taught several of his people to read and write, and he delighted to correspond in their own language with them. He is said even to have written Indian poetry. He knew the Dutch language to speak it; English only imperfectly. He had a hatred of everything English, the people, their language, their protestantism, their mode of life; and accordingly his manners were often offensive. There was no deceit on his part in his enmity, it was openly expressed; and Rasle by the side of a ruffian like Le Loutre appears a saint."

The covert designs intended by the French to be accomplished through the Indians, and Rasle's intrigues for that purpose, are narrated at length.

Mr. Kingsford is English, and of course wishes to give the English view of some matters upon which he thinks existing histories have created erroneous impressions, and the first two chapters of this volume are devoted to a defence of the English claim to the discovery and right of possession of Hudson's Bay. He says, and appears to us to prove, that nothing can be more clear than the English claim to the discovery of and settlement on these northern waters. The northern part of America being discovered in 1497, by Sebastian Cabot, under a commission from Henry VII, and Hudson having in 1610, by authority of James I, taken possession of the bay and straits that bear his name; and he then cites his authorities and states at length his reasons for the opinion he expresses.

Another and more important matter, since it affects England's reputation for justice and humanity, is the account he gives of the deportation of the inhabitants of a certain portion of Acadia, in 1755, on which the American poet, Longfellow, has founded his pathetic and beautiful poem, Evangeline, which does not directly reproach the English authorities with harshness or cruelty, but yet leaves the impression that the proceeding which was aided by the New England colonists, and cannot have been disapproved by them, had something of cruelty and tyranny in it. In England it was looked upon as an act of painful necessity, a duty unwillingly undertaken, and performed with as much care to prevent unnecessary suffering as possible. Families were not separated, and were allowed to carry with them all their portable effects, for which room could be found in the vessels which carried them. They had brought the suffering upon themselves. For forty years, says Mr. Kingsford, the country had belonged to England, and all its inhabitants over forty years of age had been born British subjects. They had been repeatedly asked to take the oath of allegiance, and had refused, sometimes with insolence, and had on every possible occasion joined the French and Indians in their savage attacks on the English colonists and their property. Every Acadian was a spy to give intelligence to the enemy, and their removal was a painful but unavoidable act of self-defence. We request any doubting reader to peruse Mr. Kingsford's statement of the case in chapter VI, of Book VIII.

The time covered by this volume, extends from 1726 to 1756, and embraces the administration of the several governors of Canada during that period, viz.—Le Marquis Beauharnois, Le Marquis de la Jouquierc, Le Marquis Duquesne, and Le Marquis de Vaudreuil, and portions of the reigns of Louis XIV, and Louis XV, in France, and George I, and George II, in England.

It is impossible in the limited space allowed us to give any idea of the amount of information and detail in the volume before us, containing as it does a very full account of a most important part of the struggle between France and England for the possession of the northern part of America. The period embraced has been called the heroic age of Canada, and it was so as regards daring, hardihood and adventurous spirit, but it was not the age of Chivalry, or generous rivalry in arms, but that of "savage unrelenting, murderous war," between two nations who had been rivals from the time of the battles of Hastings, Cressy, and Agincourt, adopting as allies, the Indian savage, and forced by such alliance into permitting, if not adopting, all the abominations of Indian warfare. The book before us is crowded with details of such warfare, midnight attacks on villages, the murder of their inhabitants and destruction of their property, the carrying off of women and children into life slavery, and the torture of prisoners, sometimes with the consent of Christian allies, and sometimes in spite of them. The attack and destruction of Deerfield, and the reprisal on Norridgewock being specimens of the manner in which the contest between two great Christian peoples was conducted in America. Mr. Kingsford believes, and we are most willing to believe with him, that the worst things were not done on the English side, but there were Indians on both sides, and the Christian victors were sometimes forced to shut their eyes while their allies indulged in the pleasure of burning a few captives. This was called *la petite guerre*. Up to the time when the narrative closes, the fortunes of the French seem to be in the ascendant; they had destroyed Oswego, defeated Braddock, and extended their holdings on Lakes Champlain and Ontario, and the Ohio, and had gone down the Mississippi to New Orleans, round the English Colonies . . . their reinforcements from France, their despotic form of government and the military character of their people giving them a decided advantage over the democratic and separate governments, and the mercantile and agricultural habits of the English colonists; so that but for the coming into power of the first Pitt, and his energetic policy and action, they might possibly have carried into effect their cherished idea of driving the English into the sea, or at any rate of confining them to the Atlantic seaboard. But Pitt came to the helm of state, and sent Wolfe, and roused the latent energies of the English colonists, and it was not long before the aspect of affairs was changed, and Canada became an English Province.

Notes on Exchanges and Legal Scrap Book.

In the recent English case of *Gardner* v. *Bygrave*, which was an action of assault and battery brought by a pupil against his schoolmaster for caning him on the hand, Mr. Justice Mathew made a joke which the *Saturday Review* regards as a "shining instance of how the tedium of legal proceedings may be profitably relieved, and the principles of law aptly illustrated by a really ready and witty observation." It was admitted on all hands that assuming caning on the hands to be a proper mode of punishment, the caning in question was a good and lawful one. The plaintiff's counsel, in an argument of a distinctly *a posteriori* character, contended that the lawfulness of caning on the hand depended on the occupation of the boy when out of school, and that the defendant ought to have inquired into the plaintiff's employment. "If he worked with his hands, such a punishment might seriously interfere with his occupation. Punishment might be inflicted elsewhere"—whereupon the court asked—"What if his occupation were sedentary?"

It was ultimately decided that caning on the hand, when properly done and for a proper reason is lawful.—*Harvard Law Review.*

TRADE COMBINATIONS.—*The Mogul Steamship Co.* v. *McGregor*, L.R.23 Q.B.D., 598, embodies an act of judicial legislation far more important than most statutes.

For the Mogul case determines that *X*, *Y*, and *Z*, independent shipowners, may lawfully form a combination, called a conference, to gain for themselves a monopoly of the tea trade at Hankow, and to drive away all competition from that port. It further decides that, for the purpose of obtaining this monopoly, the members of the conference may agree, *inter alia*, (1) to grant a rebate to persons employing exclusively the ships of the conference whilst refusing it to any one who employs a non-conference ship, and (2) in case any non-conference steamer should attempt to load cargoes at Hankow, then to send as many conference ships as may be needed to underbid the independent steamer, without any regard to profit.

The decision, moreover, of the Court in favour of *X*, *Y*, and *Z* rests on the broad principle that "competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or [other distinct illegalities] gives rise to no cause of action at Common Law" (see judgment of Bowen, L.J., p. 620), and, what is even more important, that any form of competition which would not be unlawful on the part of an individual does not become unlawful because it is carried out by a combination of individuals acting in concert.

The importance of the principle thus laid down admits of no denial. That much may be urged in its favour, both on grounds of law and of expediency (and in the kind of matter with which the Mogul case deals the questions of law and policy cannot be really kept apart), will be denied by no man who has studied the masterly judgment of Lord Justice Bowen.

The basis of the reasoning by which his judgment is supported is that com-

petition is the essence of trade, and that it is vain and inexpedient for the judges to attempt to decide what may be "reasonable" and what "unreasonable" competition. That all the Courts can look to is whether the particular acts complained of by *A* who suffers from the competition of *X*, *Y*, and *Z*, are in themselves wrongful, as, for example, fraudulent, and whether the motive with which the acts are done is the carrying on of trade, or the gratification of spite. It is not, in his opinion (and in this view Fry, L.J., coincides), the province of the judges "to mould and stretch the law of conspiracy in order to keep pace with the calculations of political economy," or, as we infer, with considerations of public expediency.

It is, however, of consequence to note the considerations which may make a critic, whatever his own views, desire that the Mogul case, and the principles on which it rests, should be considered by the House of Lords. The dissenting judgment of Lord Esher deserves the most careful attention. Partly from that judgment, and partly from the judgments of the majority of the Court, it is easy to perceive several points which may be urged against the decision of the Court of Appeal.

1. It admits of the gravest doubt whether that judgment be really supported by authority. It is difficult to reconcile with it such cases as *Hilton* v. *Eckersley*, 6 E. & B. 47, or Sir William Erle's admittedly powerful statement of the law contained in his work on the Law of Trades Unions.

2. The notion that acts, e.g. of competition, which would be lawful if done for the sake of defeating *A* as a trader, become unlawful if done from ill-will to *A*, a notion which appears to be countenanced by Lord Justice Bowen, introduces into the law a subtle, and possibly perilous, refinement. No doubt "express malice" is already known to the law. But it is known as something which is very troublesome to deal with.

3. It is difficult to see why, if the judges can determine that an agreement is unreasonable when called upon to enforce it, they cannot pronounce upon its reasonableness when called upon to say whether it be an agreement which ought not to have been made.

4. The admission that "certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several" (see judgment of Bowen, L.J., p. 616), shakes the force of a great deal of the argument in favour of the defendants in the Mogul case. For that argument really consists in showing that each of the acts done or contemplated by the defendants would have been innocent or lawful if done by a single person, and, it may be suggested, overlooks the distinction between the "coincident" and the "concerted" action of several persons.

5. It is difficult to see on what ground the agreement should be held unenforceable by law, and yet not held unlawful.

We are far from asserting that the decision is wrong. But it is of such wide scope and such great moment that criticism seems not only legitimate but desirable, at all events until the House of Lords has spoken.—*Law Quarterly Review.*

Correspondence.

THE JUDGMENT SUMMONS CLAUSES OF THE DIVISION COURT ACTS.

To the Editor of THE CANADA LAW JOURNAL:

As your JOURNAL is considered by lawyers a standard authority on the construction of Division Court law, and one in which I have years ago frequently written, please favour me with your views as to the proper construction of the two following clauses, which are in my opinion not legally carried out by some judges:—

Section 186, under old Act—under Revised Statutes, sec. 244, p. 595: "Any person imprisoned under the Act who has satisfied the debt or demand or any *instalment* thereof *payable, and the costs* remaining due at the time of the order of imprisonment being made, together with the *costs of obtaining the order* and all *subsequent costs*, shall, upon the *certificate of the Clerk of the Court* or by *leave of the Judge of the Court* in which the order of imprisonment was made, be discharged out of custody."

1. Now the question is, is not the payment of the instalment due, and costs, a condition precedent to, or a necessary qualification of the power to discharge, either under the Clerk's certificate or the Judge's order—or has either the Clerk a right to give his certificate, or the Judge the right to discharge the prisoner of their own motion, without the plaintiff's knowledge or consent? 2. Is there any distinction between the power of the Clerk and the Judge; or can the latter of his mere will—*ipse dixit—nolens volens* as to the plaintiff, and without his knowledge, take upon himself to discharge a debtor in goal under an executed warrant without the payments named?

Secondly. Section 245 of the revised Acts as to the power of the Judge cannot apply as to the abuse clause, as it presumes the act there mentioned to be done in open court. It says the Judge "before whom the summons is heard may rescind," etc. Now as to the sec. 245, some Judges take it upon themselves to construe this section as giving them as it were a "legal *carte blanche*" to do just as they please, in or *out of Court*, without any notice to the creditor who is interested.

1. Do you think this "legal *carte blanche* construction" correct, or does not the law contemplate that the plaintiff should be present to object, or re-examine his debtor, or is the Judge supposed to do as he pleases in the absence of the creditor? 2. Does not the section mean that the "think fit" "rescind or alter" is done on the hearing of same after summons in Court, or at least on notice to the creditor of some kind. The latter I think ought to be done in all cases, even if not heard in Court; yet I think the meaning is a proceeding in Court.

Will you please give me and many others interested your opinion on these two sections, and oblige.

Toronto, Dec. 2, 1889. CHARLES DURAND.

The questions put by our correspondent open up rather a wide field for debate.

Were we to ask the opinions of the several Judges in the Province on these points, no two of them might possibly exactly agree.

In the Division Court a good deal of "natural justice" must necessarily be administered, and a judge is justified in his endeavour to deal equitably with each particular case, so long as he does not override the well-known laws of the land, as laid down either by statute or by decisions of the higher courts.

It is well established that there is now no imprisonment for debt in this Province; and where a judgment debtor has been committed to gaol, under the provisions of sec. 240 of the D.C. Act, such commitment is not (in theory at least) for non-payment of money ordered to be paid, but for fraud, for contempt in disobeying the process of the Court, or for disobedience to the order of the Court when it was in his power to comply with the order.

While a Judge sitting in a criminal court and having passed the sentence of of the law has no power to remit or alter a sentence duly recorded, at least after the sittings of that particular court have closed; yet, while sitting in that court he has power to remit any imprisonment ordered for contempt, and *a fortiori* he has the power after the defendant has purged himself of such contempt.

We do not look at the imprisonment of a judgment debtor to be something done at the instance of or for the benefit of the particular creditor who may happen to put the law in motion, any more than a prosecution for felony is undertaken on behalf of the person upon or towards whom the act involving the felony has been committed. Were it so, it is quite possible that the criminal prosecution might be a bar to any civil remedy on the part of the injured person.

When the executive is called upon to extend the clemency of the crown towards a convicted criminal, it is not thought necessary to give the whilom prosecutor an opportunity of showing cause to the contrary. The crime was one against "the peace of the Queen, her crown and dignity."

On the same principle it might be argued that when it is considered that the commitment of a judgment debtor under the circumstances mentioned is not intended to be for the benefit of his creditor (though indeed it often turns out to be so), there is no reason why the creditor should have notice of an application to remit the sentence of imprisonment. On the other hand, the circumstances of the case may be such as to raise a suspicion that the application was not of a *bona fide* character, or that the statements upon which it was based were of questionable veracity, or that an order would be in some way unfair to the creditor. In cases like these the Judge might well refuse to act without having all parties before him.

It is well known that in many cases of imprisonment for contempt, the persons committed have languished in prison for most unreasonable periods. To prevent such a thing happening in any of our Division Courts, the power of the Judge is limited as to the period of commitment, and a further enactment has also been passed for the benefit of judgment debtors. This section is really as much, or more so, for the creditor's benefit as for his debtor's, for it holds

out an inducement to the latter to pay the debt, while his continued imprisonment will in no way benefit his creditor's pocket, though it may gratify his feelings.

We quite agree with Mr. Durand as to the principle involved, that when anything is to be done which touches the rights or standing of the judgment creditor, he should have full notice beforehand. But he ought to be the last to deprecate anything which imposes further costs or trouble upon him. Payment by the debtor after he has been imprisoned places the creditor in the same position as if the order for payment had been promptly obeyed in the first instance; and certainly, if this had been done, the creditor would not have been in a position to ask any further order against him without a fresh summons being taken out against him.

We think the section in question deprives the Judge or any one else of the right to oppose or refuse the debtor's discharge if he has complied with the conditions necessary to it. But, while the debtor has thus a right to his discharge where he has complied with the order, it does not follow that the Judge has not the power to order his discharge at any time, if he is satisfied that his previous order ought to be rescinded, and that without notice to the creditor. If the Court is satisfied that the contempt is purged, there seems to be no necessity for allowing the creditor to have a "say" in the matter.

Next, as to sec. 243. It does seem to us that before any further order is made, as is there permitted, the creditor should have some notice of the application. We believe the practice adopted by some Judges is this: Where facts brought to the notice of the Judge shew that it would be inequitable or unnecessarily harsh to allow the existing order to continue in force, he directs either that both parties appear before him in Chambers, or he stays his first order till the next sitting of the Court, when all parties appear and are heard.

Our opinion, then, briefly is this: As to sec. 244, (1) the payment therein mentioned is a necessary condition precedent to the debtor's discharge, and such payment gives him an absolute right thereto; but we think, whether the discharge takes place under the Clerk's certificate or by the order of the Judge, no notice to the creditor is required. (2) There seems to be no distinction between the power of the Clerk and that of the Judge. We would infer that the Clerk has no right to give his certificate unless payment has been made to him as such Clerk. If it has not been made to him, then it would appear to be necessary to apply to the Judge, who would, no doubt, in the absence of the creditor, require to be perfectly satisfied as to the debtor having complied with the order made against him.

Next as to sec. 245. Where the Judge has made an order against the debtor at the instance of his creditor, it would appear to be only right to give the latter an opportunity to be heard before altering the terms of that order, except, indeed, where the commitment is one for contempt of court only. But the hearing of such an application need not necessarily be at a regular sitting of the court.

ED. C.L.J.

DIARY FOR JANUARY.

1. Wed.....*New Year's Day.*
3. Fri.....Lord Eldon died 1838, aged 87.
4. Sat.....Chief Justice Moss died at Nice, 1881.
5. Sun.....*Second Sunday after Christmas.*
6. Mon.....Epiphany. Last day for notices for Primary Exams.
7. Tues.....Toronto Assizes Criminal side. Christmas Vacation ends.
8. Wed.....Hamilton Assizes; London Assizes.
12. Sun.....*First Sunday after Epiphany.* Sir Charles Bagot, G. G., 1842.
13. Mon.....County Court Sittings for motions begin. Surrogate Court Sittings.
14. Tues.....Primary Exam. Court of Appeal Sittings. Toronto Assizes Civil side.
16. Thurs....Admission of Graduates and Matriculants.
18. Sat.....Last day for filing papers and fees. County Court Sittings for motions end.
19. Sun.....*Second Sunday after Epiphany.*
21. Tues.....1st Intermediate Examination. Lord Bacon born 1561.
23. Thurs....2nd Intermediate Examination.
26. Sun..... *Third Sunday after Epiphany.* Sir W. B. Richards died, æt. 75.
28. Tues.....Solicitors' Examination.
29. Wed.....Barristers' Examination.
31. Fri.....Earl of Elgin, G. G. 1847.

Reports.

ONTARIO.

HIGH COURT OF JUSTICE.

(Reported for THE CANADA LAW JOURNAL.)

RE CENTRAL BANK. THE LIQUIDATORS' CASE.

Winding Up Act—R.S.C. c. 129, Remuneration of Liquidators.

Liquidators are officers of the Courts, and in determining their remuneration, the policy of our Parliaments in not sanctioning as high a rate of salary or remuneration as is allowed by private commercial corporations should be recognized.

The Courts have fixed no hard and fast rate of remuneration for the services of liquidators, but exercise a discretion in dealing with each case according to the amount involved and the responsibility incurred.

Where the amount collected in this liquidation was large, two rates of remuneration were allowed to the liquidators, viz.: three per cent. on moneys collected after pressure, and where special efforts had to be made; and one and a quarter per cent. on debts paid at maturity or collected without much effort on the part of the liquidators.

This was an application on behalf of the liquidators to fix the amount of their remuneration for their services in winding up the affairs of the insolvent Bank.

S. H. Blake, Q.C., for the Liquidators.

J. K. Kerr, Q.C., and *E. D. Armour* for certain creditors.

MR. HODGINS, Q.C., MASTER IN ORDINARY:—In disposing of the question of the remuneration of the liquidators of the Central Bank I am without a precedent to guide me, and without evidence of the commercial value of such services as they have rendered in the responsible work of winding up the affairs of this bank. A responsibility, therefore, is thrown upon me without the relief which precedent or fact might lighten, and I have no guide but a conscientious sense of what is just and reasonable for the onerous work and services of these liquidators.

Fortunately in exercising judicial supervision over their duties I have acquired a personal knowledge of the business capacity displayed by them in dealing with the disastrous and tangled financial affairs of this unfortunate bank, so I am to some extent able to form a fair estimate of the value of their services, and which, in the earlier proceedings of this winding up warranted my casting upon them a larger responsibility than the Act prescribes in ordinary cases. This extension of their responsibility was in the interest of the creditors, and has largely reduced the legal and other expenses of the liquidation, while it has increased their personal peril and responsibility as liquidators.

The successful winding up of an insolvent institution like this bank required as liquidators men having the qualities of integrity and firmness, as well as the qualifications of business capacity, industry and tact, and whose honesty of purpose and fearlessness of character would deter the financially dishonest or careless debtor from attempting to overreach or to evade the payment of just debts.

The liquidation in this case has been unusually rapid, and, as a consequence, beneficial to the creditors, in that two dividends of 33⅓ per cent. have been paid out, and circulation redeemed, in all amounting to $957,580.10 within eleven months of the appointment of the liquidators. These results may be referred to as indicating how far the creditors have been successful in securing the services of men possessing qualifications similar to those I have indicated. For such services creditors must be expected, and, I have no doubt, are willing, to pay what is fair and reasonable.

Undoubtedly, men will always be found who would gladly take offices or positions of trust even if the salary or remuneration was but a pittance, though their abilities or qualifications would prevent their competing with any degree of success with others better qualified and of a

higher cost. Such men would rarely bring qualifications or usefulness to the office or position taken ; while their want of efficiency would be an element of weakness and danger to the service or duty in which they were employed.

In dealing with this remuneration of the liquidators I have been reminded that they are public officers of our courts. There is imported into this reminder the duty of recognizing the policy of our Parliaments in determining the compensation to be given to public officers entrusted with large responsibilities. That policy seems to indicate that Parliament should provide the minimum of remuneration for the maximum of ability, efficiency and responsibility. The policy of our private corporations and commercial firms adopts, I believe, a more just and fair rule, and recognizes the duty of paying liberally for similar qualifications. Even the judiciary which decides most important and weighty questions affecting the lives and personal liberty, and rights of property of our people, as well as the validity or invalidity of Acts of our Parliament and Legislatures receives less by one-half of the compensation paid to some of the solicitors and to many of the managers of our commercial corporations.

And yet it is a principle of sound and healthy policy that the public or the State should control the best talent and most thorough qualifications for their responsible services or offices. This appears to be a recognized principle which governs individuals in their private affairs, for experience proves to them that their financial safety and their business interests, rest on such a policy ; and I think it goes as a trite saying that whatever is right and true in the administration of individual affairs or business, may be applied as a safe rule of national policy in the administration of public affairs.

Recognizing, therefore, the policy of our Legislatures in thus indicating the rate of compensation for public officers and judical functionaries, I find myself unable to adopt in fixing the liquidators' remuneration, the scale of compensation for financial services and responsibilities adopted by our great monetary or commercial institutions. Had the liquidators been the officers of such institutions they might reasonably have expected more liberal remuneration for the financial services they have rendered to the court and the creditors than, for the reasons assigned, I feel warranted in allowing them.

The Winding Up Act prescribes that the liquidators shall be paid such salaries or remuneration, by way of percentage or otherwise, as the court directs; and I assume this means what the Ontario Trustee Act (R.S.O., 1887, chap. 110, sec. 38) has expressed in fuller words, as a fair and reasonable allowance for their care, pains and trouble, and their time expended in and about the trust estate.

In arguing the question of a salary or percentage, counsel referred to the more prolonged and unfinished liquidation proceedings affecting the Exchange Bank at Montreal, which was ordered to be wound up on November 23, 1883, and under which proceedings it is stated that a monthly salary of $300 each is being paid to its three liquidators. The policy of expeditiously and efficiently winding up this bank, which, in the public interest, has been kept in view by this tribunal, has been loyally sustained by the efforts of the liquidators, and for that reason I think a percentage on the amounts realized instead of a salary will be the most equitable rate of remunerative for both liquidators and creditors.

Our statutes delegate to the courts the duty of fixing a proper remuneration ; and the courts, in executing this duty, have fixed no hard and fast rate of compensation, but have allowed themselves a wise latitude in dealing with each case according to the amount involved and the responsibility incurred.

As stated by Vankoughnet, C., in *Chisholm* v. *Barnard*, 10 Gr. 479; "Five per cent. commission on moneys passing through the hands of executors or trustees may or may not be an adequate compensation, or may be too much, according to circumstances. There may be very little money got in and a great deal of labor, anxiety and time spent in managing an estate, where 5 per cent, would be a very insufficient allowance." And in the case of *Thompson* v. *Freeman*, 15 Gr. 384, where the amount involved was above $300,000, Spragge, V. C., after consultation with Chancellor Vankoughnet, said : "If the sums had been one-fourth or one-tenth what they have been, the percentage would have been only 5 per cent.; when it is counted by a good many thousand dollars per year and in the aggregate, by hundreds of thousands, the same scale of compensation becomes excessive."

In that case the local Master had allowed 5

per cent., but on appeal the court reduced the rate to 3 per cent. on investments over $600, the learned Judge adding: "This is a larger percentage than is allowed to sheriffs, and in the case of so large an estate as this, it is, I think, sufficient remuneration."

The repealed Insolvent Act of 1875 allowed to each assignee a percentage ranging from one and a quarter per cent. to five per cent., and a similiar rate has been fixed by the Ontario Joint Stock Companies Winding Up Act (R.S. O., 1887, chap. 183, sec. 21), as the remuneration of the one liquidator provided for by that Act.

In the Dominion Act, under which these proceedings are taken, Parliament has seen fit to require the business of winding up the affairs of an Insolvent Bank to be by three liquidators, although I believe in many of our banks and monetary institutions the executive management is usually placed in the hands of two officers, the president and general manager. This provision of the Act requiring three chief executive officers may, I think, be considered more as an incidental than an absolute factor in determining the question of their remuneration. The rules under the English Act prescribe a separate remuneration for each liquidator.

After a full and anxious review and consideration of all matters connected with this expeditious and so far successful winding up, I think justice will be done to both liquidators and creditors by adopting two percentage rates as the basis of the remuneration: One, the lowest rate authorized by the Insolvent Act of 1875, viz.,one and a quarter per cent., and the other the lowest rate sanctioned by the court in *Thompson v. Freeman*, viz., three per cent.

It might be urged that under the authority of the latter case, I would be warranted in allowing three per cent. on all moneys collected by the liquidators; but as the allowance is a compensation for trouble, as well as responsibility, and as the statute gives the liquidators the supervision and approval of the court in executing many of their duties, they may reasonably submit, as to the least troublesome of their collections, to the lowest percentage rate authorized by a statute on an analogous subject.

The higher rate will therefore be allowed on all moneys collected by them after pressure, and where special efforts had to be made for the realization of the assets of the bank. The lower rate will be allowed on debts and interest paid at maturity or without much effort and on debentures sold by the liquidators. The liquidators will therefore recast the accounts, and bring in statements showing their receipts under the above heads.

The claim respecting the $203,915 taken over from Mr. Campbell cannot be considered on this application, but may be dealt with when adjusting their allowance with Mr. Campbell, or on the final winding up of their liquidation.

COUNTY OF YORK.

(Reported for THE CANADA LAW JOURNAL.)

THORNLEY *v.* REILLY.

Liquor License Act R.S.O. (1887) Cap. 194, Sec. 125. Notice not to deliver intoxicating liquor to a person in the habit of drinking intoxicating liquor to excess—Notice, by whom to be given—Time within which action must be brought—Interpretation Act, sec. 8, sub-sec. 39.

The provision in the Liquor License Act R.S.O., (1887) cap. 194, sec. 125, enabling the person aggrieved to require the Inspector to give the notice, required under the above section, does not confine the remedy by personal action to cases only in which the Inspector's services have been requested and in which he has acted. The six months within which the action for damages must be brought under the said section are to be computed from the time of the sale, and not from the date of service of notice.

(TORONTO, Nov. 1, 1889.

The plaintiff, a married woman, brought an action against the defendant, a licensed hotelkeeper in the City of Toronto, alleging that her husband William Thornley had, as the defendant well knew, the habit of drinking intoxicating liquor to excess; th t before the commencement of the action she gave to the defendant notice in writing, signed by her, not to deliver to her said husband any intoxicating liquors. The said notice was given pursuant to Section 125 of Chapter 194, of R. S. O. (1887), and was served upon the defendant by one Atkinson on the 12th of July, 1888. The writ of summons was issued on the 6th March, 1889. The defendant contended that the requirements of the said section had not been complied with, and that to entitle the plaintiff to succeed in the

action the notice given to the defendant must be given by the Inspector of Licenses for the City of Toronto, or that, at all events, the plaintiff must request the Inspector to give a notice, which, if he refuses to do, would possibly enable her to give the notice herself. The case was tried before Macdougall, Co.J., with a Jury, on the 11th September, 1889, when a verdict was rendered in favor of the plaintiff and damages assessed at the sum of $100. The question whether the notice required by the above section had been given was reserved, and after argument judgment was given for the plaintiff for $100 and costs.

MACDOUGALL, Co. J.—In this case I have carefully considered the clause in the R.S.O., c. 191, s. 125. In the earlier part of the section two methods of giving the notice required are indicated, either by the party injured or by the Inspector. This requiring the Inspector to serve the notice is an amendment of the original Act, and seems to have been adopted, possibly with the view that a notice served by the Inspector would carry with it some official authority, and receive more attention from the liquor vendor, and thus prevent the mischief that the statute aimed at. It was quite manifestly, in my opinion, not intended as a clause to narrow or limit the beneficial effect of the section, but rather to widen it. It gives the aggrieved party the right to demand official action, and from a quarter likely to be respected by the liquor vendor. That portion of the section which follows, and prescribes the consequence of disobeying the notice, differs from section 90 of chapter 181, R. S. O. 1877.

Section 90 of the Act of 1877, gave only the person giving the notice the right of action for damages, as for a personal wrong: section 125 of chapter 194 R.S.O. 1887, gives something more. It prescribes, first, a penalty not exceeding $50, to be recovered on conviction; and apparently, in addition to this remedy, the same redress to the person "requiring the notice to be given"—the right of action as for a personal wrong given under the statute of 1877. The whole contention turns upon the words "the person requiring the notice to be given."

It is contended that section 125, under the last consolidated Act, contemplates two methods of redress: First, if the person aggrieved gives the notice, and there has been a breach of the notice, he or she can proceed before a magistrate, and, upon conviction, the liquor vendor is liable to a penalty not exceeding $50. Second, if the person aggrieved requires the Inspector to give the notice—and there has been a breach of the notice—he or she can sue for damages in an action as for a personal wrong, and recover not less than $20 or more than $500. I must say that applying the canon of construction to this amended clause, set forth in sub-section 39 of section 8 of the Interpretation Act, that "every Act and every provision or enactment thereof shall be deemed remedial whether its immediate purport be to direct the doings of anything which the Legislature deems to be for the public good, or to prevent and punish the doing of anything which it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act," etc. I cannot think the contention above set forth should prevail.

Mr. Justice Burton in *Northcote* v. *Brunker*, 14 App. at p. 372, expressed the opinion that that portion of this section, which gives a right of action for damages, is not a penal provision. The liability here is not imposed upon the defendant by way of punishment, but for the purpose of compensating the plaintiff. It is also well put by that learned Judge, that "all statutes whether penal or not are now, as a matter of fact, construed by the same rules." "Penal provisions like all others are to be fairly construed according to the legislative intent as expressed in the enactment, the Courts, refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and, on the other, equally refusing by any mere verbal nicety, forced construction, or equitable construction, to exonerate parties clearly within their scope."

The provision enabling the person aggrieved to require the Inspector to give the notice, does not, in my opinion, confine the remedy by personal action to cases only in which the Inspector's services are requested, and in which he has acted. The expression, "the person requiring the notice to be given may in an action," etc., recover from the person notified, etc., means no more, in my judgment, than if the words had been "the person giving the notice." It does not say "the person requiring the notice to be given by the Inspector." I think any doubt that has arisen from the amendment of

this clause of the Liquor Act may be traced to a very common source of difficulty; the practice of our legislators to pitchfork an amendment into the middle of a section of a statute, without much regard to clearness of expression in the language used, or its harmony or logical connection with the existing language of section sought to be altered or amended.

In this case, however, I feel reasonably clear that the amendment made in section 90 of chapter 181, R.S.O., 1887, and the language used for that purpose, has not had the effect of restricting the aggrieved person's right of action to cases only where the notice has been given by the Inspector. Such a narrow construction would tend, in my opinion, to defeat the object of the Act, and is neither a fair or reasonable meaning to be attached to the words used in the section as it now stands in the Revised Statutes of 1887.

I also overrule the objection that the action is too late. The six months limit means within six months from the sale, and not six months from the date of service of notice.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Div'l Ct.] [Oct. 8, '89.

FRANK *v.* THE CORPORATION OF THE TOWNSHIP OF HARWICH.

Right of way—Road along lake shore—User and dedication—Cul de sac road ending at navigable water.

Uninterrupted user of a roadway along the edge of an unoccupied and uninclosed farm bordering on a lake upon the bed of sand formed there by the waters of the lake for a sufficient length of time will give a right of way, and the building of two piers across the same on the sides of a passage made by the breaking through of a small inland lake will not affect the right of way, as the roadway terminates at the channel made by the piers on navigable water, which is itself a natural highway.

The Queen v. *The Inhabitants of East Mark*, 11 Q.B., at p. 882, quoted.

The judgment of Falconbridge, J., affirmed.

Moss, Q.C., and *Macbeth*, for the appeal.

Matthew Wilson, contra.

Div'l Ct.] [Dec. 21, '89.

In re HIBBITT *v.* SCHILBROTH.

Prohibition—Division Court—Substitutional service of summons—Defendant out of Ontario—R.S.O., c. 51, s. 100.

At the time of the issue of the summons in a Division Court plaint the defendant was in Ontario, but she left without its having been served upon her, and an order was made after she had left for substitutional service.

In the material upon which she supported a motion for prohibition she did not negative the existence of such facts as would give jurisdiction to make an order for substitutional service, and from her own affidavit it was to be inferred that the summons had come to her knowledge.

Held, that, as the Judge in the Division Court had jurisdiction under s. 100 of R.S.O., c. 51, as amended by 51 V., c. 10, s. 1, to order substitutional service if certain facts were made to appear, and as the defendant was subject to the summons at the time it was issued, it was for the Judge to determine whether the facts necessary to give jurisdiction appeared, and his determination could not be reviewed by the High Court.

Schoff, for the plaintiff.

John Greer, for the defendant.

Chancery Division.

BOYD, C.] [Nov. 30, '89.

TRADERS' BANK *v.* BROWN MANUFACTURING CO.

Hire receipt—Default—Resumption of possession—Right to enter on premises.

Where one sold machinery to another upon the terms expressed in a hire receipt that "The title of and right to the possession of the above mentioned property, wherever it may be, shall remain vested in the said vendor, and subject to his order until paid for in full,"

Held, the vendor or his assigns had the legal right (the purchase money being in arrear and unpaid), to enter upon the premises in order to resume actual possession of the machinery, giving notice and using all care in so doing, but that it would be illegal for him to take possession by force, and an injunction might properly issue to restrain acts of force on the behalf of the vendor, but only on the terms that the vendee be likewise enjoined from using force to interfere with the rights of the vendor, but the vendor should first give such security as is usual on replevin before taking possession of the machinery.

Lash, Q.C., and *Lefroy*, for the plaintiffs.

Hoyles, for the defendants.

BOYD, C.] [Dec. 5, '89.

TOWNSLEY *v.* BALDWIN.

Mechanics Lien—Action by sub-contractor—Demurrer—Necessity of averment that something is due to the contractor.

Demurrer to statement of claim in an action by a sub-contractor to enforce a mechanic's lien, upon the ground that there was no averment that anything was due from the land owner to the contractor.

Held, that the demurrer should be allowed. If no amount is owing from the owner to the contractor there is no lien in favour of the sub-contractor.

Dr. Snelling, for the plaintiff.

J. F. Edgar, for the defendant Adams.

BOYD, C.] [Dec. 18, 1889.

RE MCCAULEY AND CITY OF TORONTO.

Municipal Corporations—Expropriation of land—Lands injuriously affected—Loss of goodwill as ground for compensation.

Appeal from arbitrators' award.

Held, that though *Rickets' case*, L.R. 2, H.L. 175, decided that in a case where land is not compulsorily taken but only injuriously affected, injury resulting from diminution of good-will pertaining to business carried on upon the premises is not an element of compensation, yet it is well settled law that where the land itself upon which the trade is carried on is expropriated, damage to the good-will may be a proper subject of compensation; and since here the whole of the appellant's land on which he had conducted his business for some twelve years, had been taken, the evidence tendered as to loss sustained by injury to his good-will is admissible, and its effect should have been considered by the arbitrators, and for this purpose the award must be remitted to them.

Lash, Q.C., for the appeal.

Biggar and *Worrell* contra.

BOYD, C.] [Dec. 19, '89.

ROUTLEY *v.* HARRIS.

Slander—Charging offence punishable by imprisonment—Crime—Malicious injury to property—R.S.C., c. 168, s. 26, 27, 58, 59.

Held, upon demurrer to a statement of claim that any defamatory charge referable to wrong-doing under the 26th and 58th sections of the Act relating to malicious injuries to property, R.S.O., c. 168, would be actionable without special damage, inasmuch as those sections impose the penalty of imprisonment for the offences therein provided for, but that if such defamation imputed wrong-doing under the 27th or 59th sections of that Act, that special damage must be alleged in as much as those sections merely impose a fine upon persons liable under them.

Aylesworth, for the demurrer.

Folingsbee, contra.

BOYD, C.] [Dec. 19, 1889.

DAWSON *v.* FRASER.

Will — Construction — Maintenance — Vested interest—Death of party entitled to maintenance.

When a will gave the rents of the testator's farm for the support and maintenance of "the family now at home," and directed that the said rents should be so applied till the youngest surviving child came of age, and it appeared that one of the children so entitled to a share of the rents had died although the youngest surviving child had not yet come of age,

Held, that the share of the deceased child in the rents devolved upon her personal representatives.

The distinction is marked in the cases between those where a provision is made for maintenance of indefinite duration and those where the duration is defined by the testator. In the former case the provision will not be carried beyond the life of the beneficiary, in the latter it

goes on for a prescribed period notwithstanding the death of the beneficiary, because to avoid an intestacy the Court will adjudge it to the representatives of the deceased.

Full Court.] [Dec. 23, '89.

SWITZER *v.* LAIDMAN.

Libel and Slander—Pleading—Admission—Justification—Mitigation of damages.

Action for slander, wherein it was charged that in April, the defendant said to A. that the plaintiff had entered her mother's house three or four times, and had stolen, in all, about three or four hundred dollars.

The defendant, in her statement of defence, pleaded that the plaintiff "admitted and confessed to A. K. that it was he who had taken the money."

The trial Judge refused to allow evidence to be given in support of the above plea, insisting that the defendant, if she wished to give such evidence, must enter a formal plea of justification.

Held, that the above ruling was right, but that objection should have been made to the pleading, either by demurrer or by application to strike it out as embarrassing, and there ought to be a new trial with leave to replead or amend the pleadings. The defendant could only set up the matters in question above pleaded in mitigation of damages, by adding thereto on the record that she had now good cause for discrediting that part of the admission or confession alleged to have been made by the plaintiff to A. K., although she honestly believed it to be true at the time she repeated the words complained of.

Carscallen, for the plaintiff.

Staunton, for the defendant.

Full Court.] [Dec. 23, '89.

RYAN *v.* MCCONNELL.

Bills and Notes—Notes as collateral security—Laches of creditors—Release of principal debtor—Necessity of proving actual injury.

Where promissory notes of third persons were turned over by the defendant without endorsement as collateral security for a debt due by him to the plaintiff, and the plaintiff now sued the defendant for the amount of the debt, and the defendant raised the objection that the plaintiff had been guilty of laches in proceeding for the payment of the collateral notes,

Held, that if the defendant had been injured by such laches, and to the extent of which he had been injured, he should be exonerated from payment, but not otherwise; and the trial Judge had pushed the law too far against the plaintiff in holding that having found the laches as a matter of fact it was a conclusion of law that detriment had followed to the defendant.

Haverson, for the plaintiff.

Mills, for the defendant.

Practice.

Q. B. Div'l Ct.] [Dec. 21, '89.

TRUAX *v.* DIXON.

Costs—Scale of—Action by sub-contractors to enforce mechanics' lien—Amounts in question—Investigating of accounts—Jurisdiction of County Court and Division Court—R.S.O., c. 126, s. 28—Right of defendant land-owner to set-off of costs—Action tried without a jury—Powers of taxing officer—Amendment of judgment.

The plaintiffs, sub-contractors, in an action brought in the High Court to enforce a mechanics' lien, claimed against the contractor $245.29, and recovered $284.54. They claimed a lien on the land for the amount due them, but upon the investigation of accounts to the extent of upwards of $1,700, between the contractor and the land-owner, it was found that the latter owed only $63.79, and the plaintiffs' lien was limited to this amount.

Held, upon an appeal from taxation of costs, that the contractor could not have sued the land-owner in the Division Court to recover the balance of $63.79, but must have proceeded in the County Court, and the plaintiffs, suing upon the same claim, were therefore entitled to County Court costs, and as the plaintiffs' claim was also beyond the jurisdiction of the Division Court, upon any construction of s. 28 of the Mechanics' Lien Act, R.S.O., c. 126, the plaintiffs could not have brought their action in the Division Court.

Held, also that, as the plaintiffs could not have hoped to establish a case which would have entitled them to High Court costs, the defendant land-owner should be allowed a set-off of the excess of his costs incurred in the High Court over what he would have incurred in the

County Court, but as the action was tried without a jury and rule 1172 did not apply, the taxing officer had no power to allow this set-off without the direction of the Court, and the judgment of the Court was amended so as to meet the case.

Aylesworth, for plaintiffs.

D. W. Saunders, for defendant George Dixon.

Q. B. Div'l Ct] [Dec. 21, '89.

CARTY *v.* CITY OF LONDON.

Costs—Taxation—Evidence taken de bene esse—Attendance of medical man on examination—Service of subpoenas by solicitor—Rules 254, 1212, 1217—Tariff A., items 16, 17.

1. An order was obtained by the plaintiff, who sued for damages for bodily injuries sustained, for his own examination *de bene esse* before the trial. The order provided that after the conclusion of the plaintiff's examination he should submit to a personal examination by medical men on behalf of the defendants, and that the defendants might afterwards continue their cross-examination of the plaintiff, and that the examination might be given in evidence at the trial "provided the defendants had been able to continue and complete their cross-examination of the plaintiff after the said medical examination." The plaintiff was examined and partly cross-examined under this order, and was examined by the medical men, but his cross-examination was never completed. The plaintiff was not examined as a witness at the trial; the depositions taken were offered in evidence, but were rejected as inadmissible under the terms of the order. The plaintiff succeeded in the action.

Held, under the circumstances of the case, that the examination of the plaintiff *de bene esse*, was a proper and reasonable proceeding, and as the failure to complete it was through no fault of the plaintiff or his solicitor, and as it was not without use to the defendants, the costs of it sh uld have been taxed to the plaintiff as part of the costs of the action.

Banfort v. Ashburnham, 13 C.B.N.S., 598; 32 L.J.N.S.C.P., 97; 7 L.T.N.S., 710; 11 W.R., 267; 9 Jur., 822, followed.

2. The plaintiff's own physician attended on him during the examination *de bene esse*, and was called as a witness at the trial, when he stated what his charges for attendance on the plaintiff would amount to.

Held, that, there being nothing to shew that he did not include in his statement the charge for attendance at the examination, they must be taken to have been included in the verdict, and could not be taxed to the plaintiff as part of the costs of the action.

3. *Held*, Armour, C.J., *dubitante*, having regard to rules 254, 1212, 1217, and items 16 and 17 of Tariff A., that the plaintiff was not entitled to tax anything for costs of service by his solicitor of writs of subpoena. Decision of Galt, C.J., varied.

G. W. Marsh, for plaintiff.

Flock, for defendants London Street Railway Company.

Swabey, for defendants City of London.

Street, J.] [Dec. 26, '89.

IN RE RYAN *v.* SIMONTON.

Evidence—Ex parte certificate of County Judge

No certificate of a judicial officer of proceedings had before him can properly be settled, where it is intended to be used as evidence unless in the presence of, or at least on notice to, all the parties concerned.

Aylesworth, for plaintiff.

W. M. Douglas, for defendant.

STREET, J.] [Dec. 26, '89.

ST. LOUIS *v.* O'CALLAGAN.

Writ of summons—Renewal of after expiry—Powers of local Judge—Certificate of lis pendens—Issue of before action—Adding parties—Statement of claim—Amendment.

Where a certificate of *lis pendens* purporting to be issued in this action was by an error of an officer of the Court issued before the action was begun, an order was made in the action so declaring and directing that it be set aside on that ground.

Held, also, that a local Judge has jurisdiction by the combined effect of rules 328 and 485 to make an order for the renewal of a writ of summons, even at a time when such writ has actually expired.

Re Jones, Eyre v. *Cox*, 46 L.J.N.S., Ch. 316, followed.

And where a local Judge, in 1887, and again in 1889, made orders renewing a writ of sum-

mons issued in 1886, and such orders were not appealed against,

Held, that the writ must be treated as having been properly renewed by such orders.

But where a new defendant was added in 1889, to an action begun in 1886,

Held, that the statement of claim should shew on its face the date at which such defendant was made a party, and an amendment was ordered.

Hoyles, for defendant Hyland.

W. H. P. Clement, for plaintiff.

C. P. Div'l Ct.] [Dec. 26, '89.

CANADA COTTON CO. *v.* PARMALEE.

Attachment of debts—Rule 935—Unadjusted insurance moneys—Locus standi of garnishees—Appeal—Garnishees out of Ontario.

Held, reversing the decision of Falconbridge, J., 13 P.R. 26, that moneys due or owing from an insurance company to a policy holder, are garnishable under the enlarged provisions of rule 935.

Webb v. *Stenton*, 11 Q.B.D. 518, and *Stuart* v. *Grough*, 15 A.R. 299, considered.

Held, also, affirming Falconbridge, J., that the garnishees had the right to appeal against an order directing the trial of an issue between the judgment creditors and a claimant of the moneys attached.

Held, lastly, that the garnishees, being a foreign corporation, were not "within Ontario," and therefore not subject to provisions of rule 935.

D. W. Saunders, for plaintiffs.

Aylesworth, for the garnishees.

Q. B. Div'l Ct.] [Dec. 21, '89.

PORT ROWAN & LAKE SHORE R. W. CO. *v.* SOUTH NORFOLK R. W. CO.

Costs—Security for—Action for the benefit of another—Non-existent corporation—Issue on pleadings.

An application for an order for security for costs was made on the ground that the plaintiffs had no corporate existence, and that their name was being used by one C., who was insolvent.

Held, upon the evidence that there was nothing to warrant the conclusion that this action was really brought for the benefit of any other than the plaintiffs.

Held, also, that the question whether the plaintiffs had or had not ceased to be an existing corporation, having been raised upon the pleadings, could not be raised and determined on an application for security for costs.

An order made in Chambers for security for costs was set aside.

Masten, for plaintiffs.

W. M. Douglas, for defendants.

Miscellaneous.

INDUSTRIAL SCHOOLS ACT, R.S.O.

FORM OF ORDER OF DETENTION UNDER.

The following form under the above Act was lately settled by Dartnell, J.J., County of Ontario.

In the matter of A. B., a child under the age of fourteen years, and in the matter of the Industrial Schools Act.

Upon the application of C. D. of ———, and upon reading the evidence taken under oath by me, of the said C. A. and of E. L., filed in the office of the Clerk of the Peace for the County of ———; the said child having also been produced before me, and the evidence aforesaid having been taken in his presence:

And it appearing to me that the said child is a resident of the County of ———, and comes within the descriptions now numbered (1, 3, 4, etc., as the case may be) in section seven of the said Act:

I find that it is expedient and proper to deal with the said child under the said Act. And I do order his detention for the period of ——— years in the "Victoria Industrial School" in the village of Mimico.

Given under my hand and seal this day of —

G. H. D., *Judge.*

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ONE of the most carefully prepared law books, looked at as a scientific treatise on most difficult subjects, and without doubt the most learned of any Canadian law book that has been published for many years, is Mr. Leith's Treatise on the Real Property Statutes. We are surprised, therefore, to learn that the edition has not been disposed of. The price has, we understand, been reduced to $2. No professional man who pretends to be conversant with the subjects dealt with therein can afford to be without it.

OUR attention is again called to the somewhat weary and unsavory subject of Q.C., by letters from correspondents, one of which we publish elsewhere, and by clippings sent us from the country press. The recent extraordinary multiplication of Her Majesty's Counsel by patents from Ottawa and patents from Toronto, and still more patents from Ottawa, and still more again from Toronto, will make it somewhat difficult to remember who is, and who is not, entitled to have the letters "Q.C." tacked to his name. So many gentlemen have been selected for this honour, who have not, to say the least, taken a very prominent position at the bar, or in any public way made apparent the extraordinary legal abilities, the possession of which has led to their being selected to be of Her Majesty's Counsel, that the ordinary mind is somewhat dazed and confused in the bewildering attempt to remember their names. One cannot always have a copy of the Ontario and Canada Gazette at hand to refer to, at the same time no gentleman would wish to be thought wanting in courtesy to a brother practitioner, and address him as plain "barrister" when he was really entitled to be called "Q.C." It would almost seem desirable to address everybody as "Q.C.," except those who may have been known to have refused the questionable honour, if any such there be, and we think there must be some of that sort. In this way probably a few persons might be erroneously entitled, but this would be a great deal better than hurt the feelings of a weak brother. In former days when distinguished ability of some kind or another in the profession had already made the name of a recipient of the honour familiar to his brother practitioners, there was not much difficulty in keeping track of the Q.C. part of the bar; but since gentlemen of distinction have taken to hiding their lights under a bushel, so that

few but the lynx-eyed advisers of Her Majesty are able to discover the faintest glimmer, the few dozen of gentlemen who are left to sport stuff gowns are placed at a sore disadvantage. Another correspondent suggests that if each one of the new legion pays out his good money for his $20 patent, the Government may be in a position to reduce the Customs duties on silk attire.

An occasional contributor, whose opinion is of weight, writes us as follows:—"The great delays in publishing the Supreme Court reports suggest the thought that the reportorial staff is greatly over-worked or lacks energy. The staff consists of an editor, a reporter and an assistant editor—large enough, we think, to report the decisions of five Judges, who hold about four sessions a year and have no circuit work, and now no Exchequer Court duties. But this triune force keep back the publication of the reports with great energy. No. 1 of the current volume (16) contains two judgments delivered on the 13th and 14th December, 1888; while in No. 2 are sandwiched the judgments of January and March, 1889, in chronological disorder, and it ends with a part of a judgment delivered on the 15th January, 1889. Our Ontario Reports are also troubled with chronological disorder, but they give us judgments delivered last September, and our Appeal Reports those delivered in November, 1889. The English Law Reports are as usual ahead of all other reports, and show that expeditious reporting can be realized when the staff is energetic and well supervised. The number for January, 1890, contains judgments delivered in England as late as 27th Nov. and 5th December last. Surely a little more energy at Ottawa would be commendable." The above is commended to the parties interested. We do not see why there should be this delay in the Supreme Court Reports, except that we have often heard of a difficulty in getting the judgments from some of the Judges, for which we presume there is some good reason. If there is no explanation, the point would seem to be well taken by our correspondent.

TRANSFERS OF STOCKS OF CORPORATIONS.

It is assumed, for the purpose of the following remarks, that the only requisites for the valid transfer by the registered owner of shares of the stock of a bank or other corporation are that a proper transfer be executed by such owner, that it be entered in the proper book of the bank or corporation and be duly accepted by the transferee. Other requisites may exist as to certain corporations, according to their charters; but on the assumption above the ordinary course appears to be merely for the person registered on the books as owner, either in person or through some one acting under a power from him, to execute a transfer, which (with the power, if executed under a power) is produced at the place of transfer, the transfer being then entered in the proper book and accepted therein

by the transferee, who then or afterwards pays the purchase money. As a general rule no certificate of ownership in the transferor is ever produced, nor is any given to the transferee as owner, at least till after the transaction is completed.

It is proposed to consider here in what position as to danger of loss by reason of defect in title in his vendor, a purchaser, as transferee, incurs on such a transfer, as also on transfer accompanied by other circumstances. Under the term purchaser must be understood a mortgagee or any other who gives value in money or otherwise.

The first case as to facts to be considered is that of *transfer* to a purchaser, either *forged* or under a *forged power*, and registry by the corporation of the purchaser as owner on his acceptance in the proper book; no other material facts existing.

In *Hildyard* v. *Southsea Co. and Keate*, 2 P.W. 76, Keate bought, on a transfer to him under a forged power, stock of the company, the property of the plaintiff, and thereafter the company paid Keate the dividends. The court held the transfer to be void and Keate liable to refund the dividends. It was said by the court:—"When Keate bought it was incumbent on him, and at his peril, to see that the letter of attorney was a true one; it was more his concern and in his power to enquire into the reality of this letter than of any other person—as to the company they were but conduit pipes—and it would be of public use that those who accept transfers of stock under letter of attorney should be obliged to take strict care of its validity, for no other person can be so properly concerned to do it."

There can be no doubt as to the above decision so far as relates to the true owner not being deprived of his shares or dividends in case of forgery where there has been but one sale (*see Barton* v. *North Stafford Railway*, and other cases hereinafter referred to), but the difficulty arises as to who is to suffer the loss where there is a sub-purchaser from a purchaser under a forged transfer or power who has been registered as owner. So far as the purchaser's loss under the above decision is concerned the case once was questioned, and was commented on with some disfavour, by the Lord Chancellor in a subsequent case of *Ashby* v. *Blackwell*, 2 Eden 299. That case, however, cannot be regarded as expressly overruling the prior one, for the decision rested chiefly on gross negligence in the company in allowing the transfer, and so alluded to by Cotton, L.J., in *Sim* v. *Anglo-American Company*, 5 Q.B.D. 200.

This case, therefore, does not directly overrule Hildyard's case as to loss to the purchaser; and it is to be remarked that, when, on the question of loss to a purchaser being argued in *re Bahia and San Francisco Company* hereafter mentioned the Hildyard case was referred to, Mr. Justice Blackburn did not deny the correctness of the decision, but merely distinguished the case from the Bahia case then being argued, on the ground that in the latter case the right of a sub-purchaser from a transferee under a forged transfer was in question. In Collins on Banking, p. 276, it is said, "If the name of the lawful holder has been forged to a transfer, which is duly registered in the books of the bank, he can compel the purchaser, though a *bona fide* purchaser, to redeliver

the shares to him, and the bank to cancel the transfer." No cases are referred to. In Thring on Joint Stock Companies (5 ed. 1889, p. 151), it is said that the purchaser under a forged power, to whom even a certificate of ownership has issued, has no claim to indemnity for loss, as he is to be taken as having acted on the faith of the transfer, not of the certificate. See also *Barton* v. *London & North-Western Railway Company*, 38 Chy.D. 144, hereafter referred to; *Sloman* v. *Bank of England*, 14 Sim. 475; *Taylor* v. *Midland Railway Co.*, 28 Bea. 287; *Midland Railway Co.* v. *Taylor*, in App., 8 H. L. Ca. 751; *Sims* v. *Anglo-American Co.*, 5 Q.B.D. *Waterhouse* v. *London & South-Western Railway Co.*, hereinafter referred to, is a strong case, showing that the loss must fall on the purchaser on the *mere fact* of his buying under a forged power or transfer, though obtaining registry and certificate to himself.

There are cases wherein the conduct of the *owner* of stock or other property may be of such a character, by *negligence* or otherwise, as to preclude him, as against the corporation or others misled by it, from objecting to an unauthorized transfer. Thus where a customer of a bank in drawing a cheque had left sufficient space in it to enable the forger to fill in the words "three hundred and" in the body, and to add the figure 3 before the other figures, and the bank without negligence on its part paid the cheque as altered, it was held to be such negligence of the customer as to disentitle him to recover from the bank; *Young* v. *Grote*, 4 Bing., 453.

The negligence must be "in or immediately connected with the transfer itself" (per Parke B., in *Governor of Bank of Ireland* v. *Trustees of Charities*, 5 H. L. Ca. 410), and not remotely connected with the act of transfer. In that case the Trustees (a corporate body) allowed their secretary to have their corporate seal in his possession, he fraudulently affixed it to powers of attorney, and under them sold out stock of the Trustees in their name in the Bank. It was held there was no such negligence as "alone would warrant a jury in finding that the Trustees were disentitled to insist on the transfer being void." See also *Waterhouse* v. *London & S.W. Ry. Co.*, hereafter referred to; and *Merchants* v. *Bank of England*, 56 L.T.N.S. 665. *Waterhouse* v. *London & S.W. Ry. Co.* 41 L.T.N.S. 553, was a case wherein the confidential clerk of C. obtained the key of the box in which was kept the certificate by defendants of C., being owner of shares in their Company, and forged a transfer which was acted on by the Company, who transferred to the defendant and gave him a certificate of ownership; the clerk received the purchase money on the transfer. The defendant sought to bring himself within the case of *Hart* v. *Frontino*, hereinafter referred to, on the ground that, relying on the certificate being true he was prejudiced in not pursuing a remedy, under the Stock Exchange Rules, against the agent selling broker; he did not rely on any payment of the purchase money on faith of the certificate. The judge found he was not prejudiced by the giving of the certificate, and that C. was not precluded by any negligence on his part from his right to the stock, and the defendants were not liable to the plaintiff, who had to suffer the loss notwithstanding the certificate granted to him. It does not appear that any directions were given as to surrender of the certificate. Again, in the language of Cairns, L.C., "the real

owner may estop himself by conduct and representation from questioning the title of a transferee, who honestly takes from a dishonest holder:" *Williams* v. *Colonial Bank*, 38 Chy.D. 399.

In a late case, *Barton* v. *North Stafford Railway Company*, 38 Chy.D. 458, stock in the Company stood registered in the names of two who were co-executors and trustees; one forged the name of the other to transfers, signed himself, sold the stock, received and misappropriated the proceeds of sale. The transfers were registered by the Company. Afterwards a new co-trustee was appointed in the place of the forger. The claim of the plaintiffs was that the defendants should reinstate them in like stock to that sold. It was held that the transfers as between the plaintiffs and the Company were nullities; that the Company should register the old and new trustees as joint owners; and that though one co-executor might make a valid transfer of a chattel, yet that rule did not apply in this case, which was governed by the Companies' Clauses Act (England). The rights or liabilities of the purchasers of the stock were not determined but reserved for future consideration, though made parties to the suit.

The result of the cases as to the above is that the real owner is not deprived of his stock by transfer on a forgery, and can compel its replacement or an equivalent in value, unless he has been, as above alluded to, so negligent as to have facilitated the forgery, or by his conduct and representations have estopped himself, as between himself and the corporation, from denying its validity; that the purchaser as from him is to suffer the loss, though registered as transferee; and if the owner, instead of proceeding against the purchaser and the corporation to be reinstated as to the stock, obtain equivalent in value as damages from the corporation, the purchaser must indemnify it. The corporation may, however, be guilty of such negligence as to preclude it from claim to indemnity; or, if the transfer be decreed to be cancelled and the true owner reinstated, to suffice to render the corporation liable in damages for their value to the purchaser; see *Ashby* v. *Blackwell*, *supra*; and the remarks above of Cotton, L.J., thereon; and those of Blackburn, L.J., given below in *Societe* v. *Walker*.

Next, take the case of such a purchaser under a forged transfer or power, or of one having from some other cause no title, but registered as owner and producing a certificate of ownership from the corporation, selling to a *sub-purchaser* who becomes registered as owner. In this case it seems the corporation must bear the loss: certainly where by the terms of its charter the certificate is made *prima facie* evidence of ownership—and must indemnify the sub-purchaser, and reinstate the name of the original true owner on the registry as owner, or possibly, indemnify the owner and leave the shares to the sub-purchaser. And it would seem that this would equally be so though there were no certificate to the seller, if the purchaser before transfer were perfected and before payment of the purchase money should on enquiry be informed by a duly authorized officer of the corporation that the seller was owner, such officer being also then told that unless the answer were in the affirmative the transfer would not be carried out; the nature of the transaction should also be mentioned; per Lush, J., in the Bahia case hereafter referred to (p. 593), and see below *Cook* v. *Canadian Bank*, per Blake, V.C., 20 Chy. 1.

What might be the law in a case where there was no certificate of ownership to the seller, or enquiry as above, but mere registry of the supposed owner who sells and transfers, is by no means so clear. In Hart's case, hereafter mentioned, Lord Bramwell seemed to consider registry of a seller as owner as equivalent to a certificate of ownership in him so far as the matter of loss to his vendee might be in question on claim by such vendee against the corporation for indemnity.

Hart v. *Frontino* and the Bahia cases below show the safety of a purchaser who buys and pays on the faith of a certificate of ownership to his vendor, or of information from a duly authorized official of the corporation that the vendor is owner. Hart's case, *Hart* v. *Frontino*, L.R. 5, Ex. 111., was one in which (to put it shortly) the plaintiff had bought and paid for shares and received a duly executed transfer and a certificate to his vendor, but neither he nor the seller was then registered as owner. The seller was afterwards registered and compelled to pay a call on the shares, whereon the plaintiff purchaser had himself registered as transferee and got a certificate of ownership, and then repaid the seller the calls. The title of the seller was bad. The court held the corporation liable to the plaintiff purchaser for the value of the shares. The judgment was based on the ground of the plaintiff having repaid the call on the faith of having been entered by the corporation as owner, and of his having been given a certificate of ownership. Mr. Baron Bramwell seemed to consider registry as important as a certificate on the question of loss, but he based his judgment on the ground above.

In *re Bahia and San Francisco Railway Company*, L.R.3,Q.B. 584, the registered owner left her share certificate with her broker, who forged a transfer from her, and left it with the secretary for registry. The secretary wrote to the owner notifying her that a transfer had been left, but, receiving no reply, he registered the transfer and placed the names of the transferees on the books and gave them a certificate of ownership. The transferees sold the shares, and the purchasers became registered as owners, and paid on the faith of the registry of their vendors as owners and of the certificate to them. It was held that those certificates to the vendors amounted to a statement by the corporation that they were entitled, and that a purchaser from them having acted on that certificate, the corporation could not deny his claim, and he was entitled to damages for loss of the shares which were ordered to be restored on the registry books in the name of the original owner. The court in giving judgment based it entirely on the giving the *certificate* and *the acting on faith of it;* the court did not rely on the registry, and their not doing so appeared to Lord Bramwell as singular.

It will be observed that whilst, as above stated, a purchaser is safe as to indemnity by the corporation when buying on the faith of its certificate, or if the answer to his enquiry is that his vendor is registered owner, since then he can say that he bought on the faith of such statement, and so is within the principle on which the Hart and Bahia cases were decided, yet his position is still undecided when, without any such certificate or enquiry, he becomes registered transferee from, and pays to, one having no title, though registered as owner, and *after* payment obtains a certificate of ownership. In such case he cannot say he

bought on the faith of any statement by the corporation. As Hildyard's case as above is law, then if mere registry of his vendor as owner be not equivalent to a warranty by the corporation that the vendor is owner, then his position is doubtful.

Till a decision that registry of a vendor is equivalent in its effect to a certificate to him of ownership, it would be prudent in some cases for an intending purchaser on a transfer to him and before payment to require production to him of a certificate of ownership in the vendor, or a statement by some official having authority to bind the corporation that the vendor is owner, the purchaser informing the official of his intended purchase as above mentioned.

The writer does not lose sight of the fact that in many of the English cases, including the Hart and Bahia cases, the shares were numbered, as required by the Joint Stock Companies' Act, and that the certificates were made *prima facie* evidence of title; nor of the fact that a certificate may remain in the hands of a person after a transfer by him, and that such person may attempt to make another sale and transfer, as to which see Waterhouse case above.

Questions as to the loss on defect in title to shares bought may arise not merely on forged transfers, or powers of attorney, but in other cases, as for instance where a vendor who stands on the books as, and transfers designating himself as *trustee*, and has no authority to sell or transfer; or where the purchaser knows, or the facts are such that he had good reason to believe that his vendor was a trustee; or where a *sheriff has seized* shares, and afterwards a purchaser accepts a transfer without any enquiry of the corporation or search by him at the sheriff's office, as in case of purchase of goods or lands; or where, as in the case of bank shares, a *lien* exists in favour of the corporation on their stock for debts due the corporation at the time of proposed transfer. In this latter case an instance is afforded by *Cook* v. *Royal Canadian Bank*, 20 Chy. 1, the head note of the report of which is as follows:—

"A bank agent, being about to make advances on the security of stock of another bank, applied to the officers to ascertain what claims the bank held against the stock, when he was informed that there was overdue paper to the amount of $500; (the banks had a lien on their stock for debts of its shareholders). Before completing the arrangement as to transfer of the stock another claim, which was current in one of the agencies of the bank, was returned unpaid; it was held that the bank had a right to a lien on the stock for the additional sum before allowing the transfer to be carried out in their books. The owner of bank stock being about to assign it, procured from one of the agents of the bank a memorandum on the back of a power of attorney to transfer the stock in the words, 'No liability at the Galt office;' it was held that this was not such a representation to the intending transferee as bound the bank; and that the bank were entitled to hold the stock for the amount of a draft which had been discounted at the Galt office and then in the hands of an agency in Montreal." The Vice-Chancellor in his judgment referred to the fact that the bank agent was not informed of the purpose for which the information was asked, and so had no notice of its importance.

That a purchaser or other person dealing with another as to stocks will be the loser where the stock stands in the name of the owner as *trustee*, thus, "A. B., trustee," or "in trust," and the purchaser knows, or has reason to know, there is a trust, and the owner transfers, having no power so to do, is afforded by the case of *Bank of Montreal* v. *Sweeny*, 12 App. Ca. 617. In that case money belonging to the plaintiff was invested for her by one Rose in shares of a company, and they were placed in his name "in trust," and he transferred to one Buchanan for his own private benefit, as Buchanan acting as agent for the Bank, and as their trustee, well knew. Both Buchanan and the Bank were aware that the stock stood in the name of Rose "in trust." Under the judgment the plaintiff was held entitled to an account from the bank. It does not appear whether or no in this case there was any clause in the charter of the company, as in the Banking and Joint Stock Company Acts, that the corporation shall not be bound to see to the execution of any trust, etc. The writer apprehends that that clause, as usually worded, applies only between the corporation, the trustee, and the beneficiaries for whom he is trustee, for the protection of the corporation, and not as between the beneficiaries and a purchaser who knows, or has good reason to know, that his vendor is trustee, and does not satisfy himself of the trustee's power to sell. See as to the effect of such a clause the remarks of Kay, J., in 28 Bevan 298. In *Sheffield* v. *London Joint Stock Bank, Royal Bank, et al.*, 13 App. 333, the respondent Banks had acquired the legal title from M. of certain stocks and bonds as security, and though they were to be regarded as having the complete legal title, and purchasers for value, yet as, in the language of Lord Bramwell, "they had notice of the infirmity of the title of M., *or* of such facts and matters as made it reasonable that inquiry should be made by them into such title," the appellant was held entitled against the respondents, except to the extent to which M. had advanced to one E. £26,000 on transfer of the stocks and bonds as security, which amount only E. had authority from the appellant to raise thereon. The respondents claimed to hold for a larger amount, viz., the indebtedness of M. See also *Dodd* v. *Hills*, and *Roots* v. *Williamson*, hereinafter, as to trusts.

Where the seller has done all on his part requisite to complete transfer, but the buyer has not, such as by omitting to sign in the books of the company the acceptance necessary, or otherwise, the following cases bear on the respective positions of the seller, purchaser, and company, such as when claims are put in by claimants under prior rights, future liability for calls, liability to sale under execution against, or insolvency of either party. These considerations depend chiefly on the requirements as to transfer of the act of incorporation of the company or of the deed of settlement creating it. A reference to the cases will show the importance for the safety of buyer and seller respectively that the transfer should be valid and complete. Thus, for instance, if not complete, the seller might continue liable for future calls; or by subsequent dealing with a purchaser in good faith defraud a prior purchaser who had not completed his title. In *Dodd* v. *Hills*, 2 H. & M. 424, the transferor was in fact a trustee for the plaintiff of shares in a company, of this the defendant

purchaser had no notice till after he had bought in good faith and got a transfer. After this he received notice from plaintiffs of the trust in his favour, and thereon registered the transfer, which registry was necessary to complete title: held entitled against the plaintiff. This case was commented on in *Roots* v. *Williamson*, 38 Chy.D. 485, and distinguished from that case on the ground that it did not appear the company had notice of breach of trust before the transfer sent for registry, which was the case in *Roots* v. *Williamson*, and that in *Dodd* v. *Hills* the purchaser completed his inchoate right by registry, and so acquired a legal title as against the plaintiff's equitable title, whilst the defendant in *Roots* v. *Williamson* never obtained registry. In that case W. held shares in trust for plaintiff, and as security for his indebtedness to defendants executed a transfer to them, delivering also the certificate of ownership. The defendants did not comply with what was requisite to obtain registry as owners. The company received notice from plaintiff of her claim, and subsequently declined to register. Held, that defendants had not a complete legal title, and that plaintiffs prior equitable right prevailed over the inchoate right of defendants. It was remarked in the judgment that the transfer was not on a sale, but to secure a debt.

It seems to be a not uncommon practice in England for the corporation to notify the person registered in their books as owner when a transfer as from such person is brought for registry. In *Societe Generale* v. *Walker*, 11 App. Ca. 20, Blackburn, L.J., stated that even if a transfer were in order and accompanied by the certificate, if any, the company were not bound to register at once, and entitled to delay to make reasonable enquiries before registering, and that such was the general practice, as he believed. It was not necessary, he said, to consider whether the company were bound to enquire.

This last case was one involving the law as to incomplete transfers in blank, fraud in making two transfers, conflicting equitable rights of the transferees, effect of certificates of ownership, and of their delivery to, and production by, one of the two transferees. Selborne, L.C., advised the House of Lords as to their judgment; and Stirling, J., in *Roots* v. *Williamson* (of which the facts are given above) said. "the following propositions were sanctioned by His Lordship's authority in that case:

"1. A mere inchoate title by an unregistered transfer is not equivalent, for the purpose of defeating a pre-existing eqitable title, to a legal estate in the shares.

"2. The title by transfer is to be deemed inchoate only (within the meaning of the last proposition) until (at the earliest) all necessary conditions have been fulfilled to give the transferee, as between him and the company, a present absolute unconditional right to have the transfer registered.

"3. A company which, before a transfer has ceased to transfer an inchoate title only, receives notice of a prior equitable title, is not necessarily bound to act on such transfer, so as to effectuate a fraud till then incomplete."

The expression in the third proposition "before a transfer has ceased to transfer an inchoate title" means, it is apprehended, so long as a perfect transfer is not registered, and is such as to give the transferee the right named within the second proposition: thus, for instance, if registry of a perfect transfer should

only be delayed by the company for the sole reason of enabling them to make enquiries or notify the person named in the transfer as transferror according to the practice in England; as to which see the remarks of Bramwell, L.J., above.

In *Goodwin* v. *The Ottawa Company*, 22 U.C.R., 186, the plaintiff was held not entitled to a mandamus to defendants to compel them to enter him on the register as a shareholder, he having bought at *sheriff's sale*, and the sheriff not having complied with the Act, which required service by him on the Company within 10 days after sale of copy of the writ, with his certificate as to the sale and purchasers. See also *Woodruff* v. *Harris*, 11 U.C.R., 490; *Brock* v. *Ruttan*, 1 C.P. 218.

Magnus v. *Queensland Bank*, 36 Chy.D. 25, 37 Chy.D. 466, shows the responsibility and duty of a bank, taking a transfer of stock as security for a loan, to see, when the loan is paid off, that the *re-transfer* is made *to the proper party*, under such circumstances as in this case, which were substantially as follows: There were three co-trustees, of whom G. was one; they all executed a transfer to officials of, and as trustees for, the Bank, on representation by G. to his two co-trustees that it was advisable to sell the stock: on the same day G. borrowed from the Bank, who, on the hearing, alleged that G. represented that his co-trustees authorized him to pledge the stock. The loan was paid off, and the Bank, instead of retransferring the stock to all the co-trustees, transferred to purchasers from G., who received the purchase money and misappropriated it. The Bank was held liable. The facts are to be gathered from both reports. The Bank here neglected the execution of a *duty*, rather than of an implied trust. It does not appear whether the Bank was by its charter exonerated from seeing to the execution of trusts in the mode usual in Canada; but even though it had been, the writer apprehends it would not have been protected.

ALEX. LEITH.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for December are continued:

In *Whitby* v. *Mitchell*, 42 Chy.D. 494, Kay, J., was called on to determine the legal effect of a deed of appointment made under a marriage settlement, whereby lands were limited to the use of the husband and wife successively for life, with remainder to the use of their issue (born before any appointment made), as they should by deed appoint. The husband and wife by the deed in question appointed part of the lands to the use of their daughter for life, for her separate use without power of anticipation, and after her decease, to the use of such persons as she should by will appoint, and in default of appointment to the use of her children living at the date of that deed, as tenants in common in fee. Kay, J., held that the only way to try the validity of the deed of appointment was to read the limitations therein contained with the original settlement; and so doing, it was clear that the appointment made by the deed was invalid

except so far as it gave a life estate to the daughter, because the subsequent limitations offended against the rule of law which forbids the limitation of land to an unborn person for life, with a limitation over to any child of such unborn person. This rule of law, he held, was an absolute rule, and independent of the rule against perpetuities. He therefore made a declaration that the deed of appointment was void, so far as it affected to restrain the appointee from anticipation, and to give her a testamentary power of appointment, and to give the property in default of appointment to her children.

WILL—CONSTRUCTION—GIFT TO CHARITY—PERSONS NOT UNDER 50—"AGED" PERSONS WITHIN 43 ELIZ., C. 4.

In re Wall Pomeroy v. *Willway*, 42 Chy.D 510, a will came up for construction whereby the testator had directed that the interest of a fund should be for ever divided into annuities of £10 each, and be paid half yearly "to an equal number of men and women not under fifty years of age, Unitarians who attend Lewin's Mead Unitarian Chapel, or Chapelsty in Bristol; a tablet to be placed in Lewin's Mead Chapel to give information of gift,otherwise how should the deserving know of it." Kay, J., held that this was a good charitable gift for the benefit of "aged" persons within 43 Eliz., c. 4.

COMPANY—REDUCTION OF CAPITAL—REDUCING PART OF SHARES ONLY—ULTRA VIRES—(SEE R.S.C., C. 119, S. 19.)

In re Union Plate Glass Co., 42 Chy.D., 513, an application was made to Kay,J., to sanction a resolution reducing the capital of a joint stock company, which he refused to do, on the ground that the resolution provided merely for the reduction of some of the shares; this he held to be *ultra vires* of the company, notwithstanding the cases of *Re Barrow Hæmatite Steel Co.*, 39 Chy.D., 582, and *Re Quebrada Railway Co.*, 40 Chy.D., 363, which he declined to follow.

WILL—LEGACY PAYABLE OUT OF PROCEEDS OF LAND—INTEREST, FROM WHAT TIME PAYABLE.

In re Waters, *Waters* v. *Boxer*, 42 Chy.D., 517, the question arose, from what time a legacy payable out of land on the death of a tenant for life bore interest. The testator by his will devised his real estate to his wife for life, and after her death he directed it to be sold by trustees, who were, out of the proceeds, to retain £1000 and interest at 4% to the date of retainer, upon trust for his daughter and her children. And he empowered the trustees to postpone the sale for three years after the death of his wife, and declared that the rents of the unsold real estate should be applied as the income of the proceeds of sale would be applied if the lands had been sold and the proceeds invested. The wife survived the testator, and died; and about two and a half years after her death the trustees proposed to sell the land, and the question was whether the £1000 legacy and the capitalized interest thereon to the death of the widow, carried interest at 4% per annum, payable out of the rents of the real estate from the death of the widow, or only from the expiration of one year from her death.

Kay, J., decided that the interest was payable out of the rents from the date of her death.

TRUSTEE—SETTLEMENT—CONSTRUCTION—POWER TO APPOINT NEW TRUSTEES—DONEE APPOINTING HIMSELF TRUSTEE.

In re Skeats, Skeats v. *Evans*, 42 Chy.D., 522, the donees of a power of appointment contained in a settlement, whereby they were empowered in certain contingencies to appoint any "other" person or persons to be new trustees of the settlement, executed an appointment whereby they purported to appoint one of themselves a new trustee—but this Kay, J., held to be invalid both on the ground that the power to appoint new trustees was fiduciary, and therefore a donee of the power could not appoint himself,and also because by the terms of the power it was required that the person appointed a new trustee should be some "other" person than the person making the appointment.

SETTLEMENT—CONSTRUCTION—TRUST FOR WIFE'S NEXT OF KIN—TIME FOR ASCERTAINING NEXT OF KIN.

In *Clarke* v. *Hayne*, 42 Chy.D., 529, the point adjudicated upon turned upon the construction of a marriage settlement made in 1839, whereby property was settled on the wife for life, and after her death, for her husband for life, and after the death of the husband and wife, in trust for the persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto in case the wife having survived her husband, were to die possessed thereof and intestate. The wife died in the lifetime of her husband, and the persons who were her next of kin at the time of her death, were not altogether the same as those would have been her next of kin had she survived her husband. Kay, J., decided that the persons who were entitled were those who would have been next of kin had the wife survived her husband and died intestate immediately after him. The cases of *Druitt* v. *Seaward*, 31 Chy.D., 234, and *Re Bradley* 58, L.T.,N.S., 631, he declined to follow.

WILL—CONSTRUCTION—"SECURITIES FOR MONEY"—VENDOR'S LIEN.

In *Callow* v. *Callow*, 42 Chy.D., 550, the short question was whether a bequest of "all securities for money" would include money due to the testator in respect of which he had a vendor's lien for unpaid purchase money. Chitty, J., held that it would, and in doing so expressed some doubt as to the correctness of the decision of Page Wood, V.C., in *Goold* v. *Teague*, 7 W.R., 84.

COSTS—TAXATION—THIRD PARTY—DELIVERY OF BILL OF COSTS—ORDER OF COURSE FOR TAXATION.

In re Robertson, 42 Chy.D., 553, there had been a sale of land by two co-owners who acted by separate solicitors; and the solicitor of one of the vendors having made out his bill against his client, sent it to the solicitor of the other co-owner, who sent it to the purchaser. The purchaser, as a third party liable to pay the bill, then obtained an order of course for taxation of the bill on an allegation that it had been delivered to him. The present application was

then made by the solicitor to stay all further proceedings under the order, and it was held by Chitty, J., that the allegation that the bill had been delivered was a material one, and was not satisfied by a merely constructive delivery, and that in the circumstances of this case there had been no delivery to the purchaser, and therefore that the order had been irregularly obtained.

APPOINTED FUNDS—PAYMENT OF PART—SUBSEQUENT LOSS—DEFICIENCY—HOTCHPOT.

In re Bacon Hutton v. *Anderson*, 42 Chy.D., 559, certain trust funds had been appointed in pursuance of a power in a deed which contained no hotchpot clause, and certain of the appointees were rightly paid a portion of the fund so appointed to them. Subsequently, owing to an unavoidable loss, the trust fund became insufficient to pay all the appointees in full, and the question arose whether under the circumstances, in the division of the residue, those who had been partly paid were bound to bring the amounts they had received into hotchpot; but Chitty, J., held they were not, but that, on the contrary, the balance of the fund belonged to all the appointees in proportion to the unpaid amounts.

WILL—BEQUEST OF ANNUITY—ADMINISTRATION OF ESTATE—RIGHT OF ANNUITANT TO HAVE ESTATE REALIZED.

In re Parry Scott v. *Leak*, 42 Chy.D., 570, a testator bequeathed annuities of £700 charged on his property, which consisted of two freehold theatres and two leasehold theatres. Each of the leasehold and one of the freehold theatres was subject to a mortgage amounting to £12,500. The testator gave the residue of his estate to his next of kin. The theatres produced more than sufficient income to pay the annuities and they had been punctually paid. The annuitants, however, claimed to have the leasehold theatres sold, and the mortgages paid out of the proceeds, and the balance invested, in the mode in which funds under the control of the Court are invested to provide for the payment of the annuities. The residuary legatees, on the other hand, proposed that the executors should raise by mortgage of one of the leasehold theatres sufficient to pay off the mortgages, and to secure the annuities by first mortgage on the two freehold theatres, which produced a net income of about £1600, the charge of the annuities on the residue of the estate (subject to the new mortgage) remaining undisturbed. North, J., decided that the annuitants were not entitled to have the leasehold theatres sold, but (the estate being cleared by the payment of the testator's debts, etc.), they were only entitled to have the annuities sufficiently secured, and he considered the security proposed sufficient.

COMPANY—WINDING UP—JURISDICTION—UNDERTAKING FOR PUBLIC BENEFIT.

In re Barton Water Co., 42 Chy.D., 585, North, J., came to the conclusion that he had power to make an order for the winding up of a water company upon which powers for the public benefit had been conferred by the proper authority, although it might not be possible to sell the undertaking and property of the company without an Act of Parliament.

MORTGAGOR AND MORTGAGEE—MORTGAGEE IN POSSESSION—RECEIVER OF MORTGAGED ESTATE.

In re Prytherch, Prytherch v. *Williams*, 42 Chy.D., 590, the law regarding the appointment of receivers of mortgaged estates is discussed by North, J., who held that the Court has under the Judicature Act, s. 25, s.s., 8, a discretion as to the appointment of a receiver; that a receiver may be appointed at the instance of a legal mortgagee,but that he has no absolute right to a receiver, and that the power given by the above section may be exercised at the trial as well as upon an interlocutory application; and, lastly, that a mortgagee who has once taken possession cannot relinquish it, so as to escape liability, at his pleasure, and that as a general rule the Court will not assist him to get rid of his responsibility as a mortgagee in possession, by appointing a receiver at his instance. Speaking of the position of a mortgagee in possession, the learned judge says at p. 600: "In my opinion, when he once takes upon himself the burden which is imposed on all mortgagees who are in possession, he must continue to perform the duty, and he cannot when he pleases elect to give it up." He refused to appoint a third person receiver, but with the assent of the mortgagors, he appointed the mortgagee himself receiver, without salary, and without security.

MUNICIPAL BY-LAW—NEW STREET—BUILDING ON NEW STREET.

In *Hendon* v. *Pounce*, 42 Chy.D., 602, the validity of a municipal by-law came in question, which provided that every new street laid out should be at least 40 ft. in width, and that every person who should construct a new street, shall provide at one end, at least, of such street, an entrance of a width equal to the width of such street, and open from the ground upwards. This by-law was held to be *intra vires* and reasonable, and that it prevented a land owner from constructing a new street upon his land until he had provided an entrance to the new street of the specified width, even though the entrance could only be made over the land of another person, over which he had no control; and it was also held by North, J., that the construction of a new street included building houses abutting on it, and that a land owner could not, until an adequate entrance had been provided, erect houses abutting on the proposed new street.

MORTGAGOR AND MORTGAGEE—RIGHT TO REDEEM DISPUTED—INTEREST—COSTS.

In *Kinnaird* v. *Trollope*, 42 Chy.D., 610, we have the concluding stage of the action, the original hearing of which is reported in 39 Chy.D., 636, noted *ante* vol. 25, p. 107. The action, it may be remembered,was brought by the mortgagee, on the covenant against the mortgagor. The mortgagor had assigned his equity of redemption, and the assignee had executed a further charge in favor of the mortgagee. The defendant applied to stay proceedings on payment of the amount due on the covenant, and claimed that on payment of the amount, the plaintiffs should assign the mortgaged estate, but this they refused to do, unless paid the further charge also; this contention was decided against them, as appears by the former report of the case. An account was then taken, and the Chief Clerk certified the amount due down to the day appointed for payment. The defendants applied to vary this certificate by disallowing all interest

subsequent to the application to stay the proceedings—but Stirling, J., held that the application to stay the proceedings was not equivalent to a tender, and that interest was consequently payable up to the payment of the principal—and on the further consideration of the action, he disallowed the plaintiff any costs occasioned by their having unsuccessfully disputed the defendant's right to redeem.

SETTLED ESTATE—TITLE DEEDS—CUSTODY OF DEEDS—EQUITABLE TENANT FOR LIFE.

In re Burnaby, 42 Chy.D., 621, Stirling, J., decided that an equitable tenant for life, of a settled estate, is entitled to the custody of the title deeds of the estate, upon undertaking not to part with them without the consent of the trustees, and to produce them to the trustees on all reasonable occasions.

JOINT STOCK COMPANY—PROFITS APPLIED TO EXTENSION OF WORKS—BONDS BEARING INTEREST IN PAYMENT OF DIVIDENDS.

In *Wood* v. *Odessa Waterworks Co.*, 42 Chy.D., 636, an application was made to Stirling, J., to restrain the directors of a company which had applied its profits in the construction of productive works, from issuing, in pursuance of a resolution which had been passed at a meeting of the shareholders, bonds bearing interest in payment of dividends. The articles of association empowered the directors, with the sanction of the company, to declare a dividend "to be paid" to the shareholders. It was held that the proposed issue of bonds was not warranted by the articles, and the injunction was granted.

APPOINTMENT—REVOCATION—APPOINTMENT BY WILL—SUBSEQUENT INCONSISTENT APPOINTMENT BY DEED WITH POWER OF REVOCATION—WILL SPEAKING FROM DEATH—WILLS ACT, 1 VICT. C. 26, S.S. 19, 23, 24, 27—R.S.O. C. 109, S. 26.

In re Wells Hardisty v. *Wells*, 42 Chy.D., 646, a husband having power to appoint by deed, with or without power of revocation and new appointment, or by will among the children of his marriage, in 1869 made his will in express exercise of the power in favor of his four children. In 1878 by deed, reciting a previous appointment made in 1864 with a power of revocation, he revoked the appointment thereby made, and appointed the fund between his four surviving children and the three children of his deceased child. In 1883 he made the appointment made by the deed of 1878 in favor of his eldest son irrevocable, and died in 1888. Under these circumstances three questions arose, first whether the will of 1869, which under the Wills Act s. 24 (R.S.O. c. 109, s. 26) speaks from the testator's death, operated as a revocation of the appointment made by the deed of 1878. Secondly, whether the will operated as to the share invalidly appointed in favor of the grandchildren; and thirdly, whether the eldest son was bound to elect between real estate which devolved on him under the settlement as tenant in tail, and the interest appointed by the deed of 1878, or by the will, and it was held by Stirling, J., that as the deed bore date after the will there was sufficient evidence of a "contrary intention" within s. 24 of the Wills Act, (R.S.O., c.109, s. 26), and that consequently the will did not speak from the death

of the testator so as to revoke the appointment by the deed of 1878; that as to the share invalidly appointed by the deed of 1878 in favor of the grandchildren, the will operated; and lastly, that the eldest son was not put to any election as regarded the benefits taken under the deed of 1878; but that he was as regarded those taken under the will, because the will took effect by operation of law and independently of the intention of the testator.

TRUSTEES—SOLICITOR—COSTS IMPROPERLY INCURRED—COSTS OF ACTION AGAINST TRUSTEES.

In re Weall, Andrews v. *Weall*, Chy.D., 674, was an action by a tenant for life against trustees, claiming that certain costs which the trustees had allowed their solicitor to deduct from the rents collected by him should properly have been charged against the *corpus*, and that others were improperly incurred, the contention of the plaintiff was upheld, and Kekewich, J., ordered the defendants to pay the costs of the action. In the judgment of the learned Judge will be found some useful observations on the duty and liability of trustees as regards solicitors employed by them.

THIRD PARTY—INDEMNITY—COSTS.

Blore v. *Ashby*, 42 Chy.D., 682, was an action for specific performance. The defendant pleaded that he was not liable, on the ground that he signed the contract as agent for another person. The defendant served this other person with a third party notice, and the third party appeared and took no further proceedings. The defendant obtained an order that the question as to the liability of the third person should be tried as soon as might be after the trial of the action. At the trial the third party appeared by counsel and claimed to have the question tried between him and the defendant immediately after the trial of the action without obtaining any direction as to the pleadings or otherwise; this it was held he was entitled to do, and that if the defendant wished for any such directions he should have taken steps to have them given. The trial resulted in favor of the plaintiff as against the defendant, and the question of the liability of the third party was determined in favor of the defendant. The third party was ordered to pay the costs of the third party proceedings between him and the defendant, but the defendant having set up a defence which had failed was ordered to pay the costs of the action.

INJUNCTION—INJURY TO ADJOINING HOUSE—CELLAR—STOVE—REASONABLE USE.

In *Reinhardt* v. *Mentasti*, 42, Chy.D., 685, Kekewich, J., granted a perpetual injunction under somewhat peculiar circumstances. The defendants, who kept a hotel in London, had put up a stove in their kitchen, the heat of which rendered the cellar of the plaintiff in the adjoining house unfit for storing wine. The learned Judge decided that although the defendants were acting reasonably in the use of their house, yet as they caused, what he considered, serious annoyance and injury to the plaintiff, the Court was bound to interfere and protect the plaintiff: and that the jurisdiction of the Court did not depend on the question of reason-

able use. This certainly seems a somewhat extreme application of the maxim *sic utere tuo ut alienum non lædas*, and it is doubtful whether the exigencies of life in this country would permit of its application here to the same extent.

Correspondence.

OUR QUEEN'S COUNSEL.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Your remarks in a late number of THE LAW JOURNAL anent the recent appointment of Q.C.s cannot fail to commend themselves to the profession as a whole, as well as to the public. Nothing could more effectually bring this "order" into utter contempt than such an indiscriminate increase in its numbers as we have just witnessed.

So soon as a distinction of any sort is conferred upon persons unworthy of it, just so soon does it cease to have any value, and this is precisely the case with the appointment in question.

It is safe to say that in no other part of the British empire are Police Court practitioners and Division Court advocates similarly honoured.

Her Majesty's "patent" no longer affords any evidence that its Canadian possessor has either forensic power, literary ability, or professional standing of any sort, and many of those who have been thus favoured are not even men of respectable talents.

That the appointing power should have been prostituted in such a manner is very much to be regretted, and cannot be too strongly condemned.

But my object in writing to you is not to point out what everybody knows, but rather to ask the question (and to endeavour to answer it), does not this extraordinary exercise of governmental power convey to us some lesson? And here let me say that we are not dealing with any new phenomenon, but merely with a new development of phenomena already well established, and which serves to show us once again the baneful influence of party politics. And this is the lesson I desire to enforce.

The truth is, the "machine" politician has laid his slimy hand upon this "institution," and robbed it of its value, bringing it, as he has brought everything else subject to his control, into disrepute. It is every year becoming more painfully evident that the substantial interests of the country are being completely subordinated to the interests of "party." Every device that can be originated, no matter how questionable, is not only tolerated but welcomed by the professional politician, so long as it will serve to strengthen the "party" to which he belongs. No sacrifice is considered too great, no expenditure too heavy, no inconsistency too glaring, no compact too demoralizing, no favouritism too rank, no shock to our moral sense too severe, if it will either bring votes, discharge political obligations, or revive the flagging zeal of some party political hack, and

many of the recent appointments are merely a link in this "endless chain" of political expediency.

But the remedy proposed by your correspondent to establish in Canada the discarded order of Sergeant-at-Law, abolished years ago in England, would not mend matters, for a very obvious reason—political considerations would enter into the appointment, and unworthy persons would soon creep into the ranks of the Sergeants.

No; the remedy is not to be found by the creation of a new order, but rather by the abolition of the present one, or else a radical change in the method of appointing its future members. The appointment itself must of course still rest with the Government as representing the Queen, but the appointing power should in no case be exercised except at the instance of some learned and independent body, such, for example, as a board whose members are chosen from the Faculties of all the Universities, or by the Judges of the Supreme Court.

If the discussion of this question only leads to a clearer apprehension of the evils of our present governmental system in the matter of patronage and preferment—based as it is on the pernicious doctrine that *every party political service must be rewarded*—it will have done good. The constant application of this doctrine is so demoralizing in its effects that healthy political sentiment, to say nothing of healthy political action, has been all but destroyed.

Independence is practically unknown, and wherever it presents itself the machine politician pronounces it a heresy and the party "organizer" is instructed, if possible to discredit and destroy it, although it is the only remedy for the present deplorable condition of things.

As to whether the people are sufficiently alive to the magnitude of the evil to apply the remedy which is practically in their hands is open to grave doubt.

Yours, etc.,

January 20th, 1890. ONLOOKER.

WHO MAY SOLEMNIZE MARRIAGE?

To the Editor of THE CANADA LAW JOURNAL:

The case of *Lawless* v. *Chamberlain*, argued recently before Chancellor Boyd, at Ottawa, and decided by him against the petitioner, exposed an usurpation of powers which has been fostered by carelessness in the draftsmen of our Ontario Statutes, and winked at by people, owing to their proverbial indifference to what is everybody's business.

The action was brought by Mr. Lawless, sr., to annul the marriage of his infant son, on the grounds of minority and the want of parents' consent.

The so-called marriage ceremony was performed by one R. M., in the city of Ottawa. The said R. M., had been admitted as a missionary minister into the Methodist connexion some twenty-five years back. For the purpose of increasing his usefulness and value as a missionary, he obtained the degree of M.D. from an Ontario College, and then set sail for the West Indies. After a short term

of service there, he resigned, as being a confirmed invalid. He came to Ottawa, was put on the Methodist ministers' superannuated list, was restored to robust health and has since so continued. He does no active pastoral work now, nor has he any congregation, but earns his living as, and styles himself, a physician, surgeon, public vaccinator, and coroner. Besides carrying on this plurality of occupations, he does what is complained of more particularly, namely, he performs, illegally, as I think, the ceremony of marriage. This biographical notice is necessary to the argument.

The plea advanced by the said R. M. in extenuation of his conduct as a "coupler," is, that once a minister always a minister. Having once received the faculty of performing the ceremony of marriage, he retains it under all conditions and changes of life, office and domicile. He points triumphantly to R.S.O., c. 131, s. 1, and is stubbornly defiant. This section reads as follows: "(1) The ministers and clergymen of every church and religious denomination duly ordained or appointed according to the rites and ceremonies of the churches or denominations to which they respectively belong, and resident in Ontario, may, by virtue of such ordination or appointment, and according to the rites and usages of such churches or denominations respectively, solemnize the ceremony of marriage between any two persons not under a legal disqualification to contract such marriage." At the trial above mentioned, Chancellor Boyd was of the opinion that R. M. was duly qualified in this direction.

Let us examine more closely, and by the light of other times and other statutes see whether it ever had been or was now the intention of the legislature to permit a superannuated minister, *i.e.*, one no longer attached to any congregation or religious community as its minister, and not doing duty as such, to solemnize the ceremony of marriage. In the case in point before us, we find a man responsible to no ecclesiastical authority or subject to no such supervision; without a church, chapel, or meeting house in which to perform the ceremony, or wherein to keep the books registering its solemnization; and yet performing one of the most responsible offices of a minister.

The contention of R. M. strikes me as absurd, and if his interpretation of chapter 131 is correct, then it certainly looks as if common sense, research, and the wisdom of experience had been ignored when this chapter was drafted.

Confining ourselves in the first instance to the Acts of the Parliament of Upper Canada and the Province of Ontario, and the Acts of old Canada relating to this Province, we first meet with 38 Geo. III., chap. 4 (1798), the ancestor of all marriage Acts in this Province. Under its provisions the minister officiating had to be ordained. He had to prove his ordination before the Justices of Quarter Sessions, and produce seven persons who would declare him to be the minister of their congregation or religious body. A certificate from the Quarter Sessions issued, certifying that he was the settled minister, etc. The certificate of marriage ran to this effect: "I, E. F., minister of the community of———, at ——," etc.

11 Geo. IV., chap. 36 (1831), sec. 3, reads as follows: "It shall and may be lawful for any clergyman or minister of any church, society, congregation or

religious community of persons professing to be members of the Church of Scotland, Presbyterians, Methodists, etc., who shall be authorized, etc., to solemnize the ceremony of marriage," etc.

10 & 11 Vict. (1847), chap. 18, sec. 2, reads: "No clergyman or minister of any denomination of Christians, unless he shall have taken the oath or affifmation of allegiance before the Registrar of the County in which he shall officiate as such clergyman or minister, etc., shall," etc.

By 20 Vict. (1857), chap. 66, secs. 3 & 4, it is provided that every clergyman or minister shall, immediately after the solemnization by him of any marriage, enter in a book by him kept for that purpose, which book shall be and continue to be the property of the church or denomination to which he shall belong at the time of such marriage, a true record of such marriage, etc. (See also R.S.O. (1887), chap. 131, sec. 19.) In the event of the death or removal of any minister, it shall be the duty of his successor, or other person having the legal custody of the book referred to, etc.

We now come to the Consolidated Statutes of Upper Canada (1859). Sec. 1 of chap. 72 gives almost the identical wording to be found in the Revised Statutes of Ontario for 1877, chap. 124, and the Revised Statutes for Ontario (1887), chap. 131, sec. 1, which we have already quoted. But there is this important difference to be observed between them, viz., that in the two last named collections the words "church," "churches," "denomination," "denominations," are all spelt without capital letters; whereas sec. 1 of the C.S.U.C., chap. 62, is printed as follows: "(1) The Ministers and clergymen of every church and religious denomination in Upper Canada, duly ordained or appointed according to the rites and ceremonies of the Churches or Denominations to which they respectively belong and resident in Upper Canada, may," etc. This, I claim to be conclusive of the matter; the "church" is the individual and particular body of worshippers to which the minister is attached as pastor; and "Churches" or "Denominations" mean that religious body as a whole of which the "church" is one part.

I have proved, I think, by the historical method, that according to the law of Ontario, in order to solemnize marriage it is not sufficient to be or have been a minister or clergyman; such minister must have under his religious charge a congregation or community of souls. The shepherd must have his flock and sheepfold to claim the full privileges and all the emoluments of a shepherd.

To show this to be a rational and business-like regulation, we may state that in the Province of Quebec "Acts of Marriage" are inscribed in registers kept for each Protestant church or congregation or other religious community. These registers are furnished by the churches, congregations or religious communities, and are kept by the rector, curate, or other priest or minister having charge of these congregations, etc.

In England marriages must be celebrated either in a church of England, a registered building, or in the superintendent Registrar's offices.

To conclude, I think that in the case of *Lawless* v. *Chamberlain* the so-called marriage by the multifarious practitioner R. M. was voidable as having been per-

formed by an unauthorized officiator; and the marriage thus voidable can be rendered void by proceedings commenced and persevered in within a reasonable time after the ceremony—which was done in the particular case under consideration.

RICHARD JOHN WICKSTEED.

Ottawa, December, 1889.

[We publish the above as the subject is interesting. As to whether he is right in his contention, we give no opinion. He may be, but we cannot say that we agree with all the lines of argument he advances.—ED. C.L.J.]

Notes on Exchanges and Legal Scrap Book.

CHANCELLOR KENT.—He was one of the many distinguished sons of Yale, where he graduated in 1781. After graduating, the future Chancellor began reading law with Egbert Benson, then Attorney-General, and afterwards one of the judges of the Supreme Court of New York; but law was not his only reading. All good reading became a ruling passion, varied by extensive studies in the ancient and modern classics.

Taking his degree of Master of Arts in course, in September, 1784, he was admitted an attorney of the Supreme Court in January, 1785, and the following April married happily and settled in Poughkeepsie, then a mere country village.

In 1787, the great political events of the time called for a decision in his mind of the federal question, with the decided result of his embracing those principles adorned by Jay, Hamilton, and other eminent men of that party. It has been noticed that of all graduates of Yale who have lived in the history of their times, none have fallen under the charge of lukewarmness or indecision; it does not seem to be in the atmosphere of those college elms. This was as true of Calhoun as of Evarts, of Kent as of Waite. This is testified to by the universal use of the first volume of Kent's Commentaries, published after nearly forty years' belief in the principles which are to-day styled National.

As an example of the polished yet forcible style of his celebrated Commentaries, we extract the following passages on the powers and jurisdiction of the Supreme Court (Vol. I., 296):—

"The judicial power in every government must be co-extensive with the power of legislation. It follows, as a consequence, that the judicial department of the United States is, in the last resort, the final expositor of the Constitution as to all questions of a judicial nature. Were there no power to interpret, pronounce, and execute the law, the government would either perish through its own imbecility, as was the case with the articles of confederation, or other powers must be assumed by the legislative body, to the destruction of liberty.

"That the interpretation of treaties, and the cases of foreign ministers, and maritime matters, are properly confided to the federal courts, appears from the close connection those cases have with the peace of the Union, the confusion

that different proceedings in the separate States would tend to produce, and the responsibility which the United States are under to foreign nations, for the conduct of all its members.

"The other cases of enumerated jurisdiction are evidently of national concern, and they constitute one of the principal motives to union, and one of the principal cases of its necessity, which was the insurance of domestic tranquility. The want of a federal judiciary to embrace these important subjects was once severely felt in the German confederacy, and disorder, license, and desolation, reigned in that unhappy country until the establishment of the imperial chamber by the Emperor Maximilian, near the close of the fifteenth century; and that jurisdiction was afterwards the great source of order and tranquility in the Germanic body."

The interval between 1787 and the publication of the Commentaries, a period of nearly forty years, was passed in a little politics, as a member of the New York Legislature in 1790, 1792, and 1796; in his law lectures at Columbia College in 1794-5, and in 1824; but chiefly as Justice of the State Supreme Court, from 1798 to February, 1814, and as Chancellor until July 23, 1823, when he had attained the constitutional age for retiring—sixty years.

Perhaps the great service which Chancellor Kent rendered in his judicial capacity, was the habit he set of preparing a written opinion in every case of sufficient importance. It had been the judicial custom to deliver oral opinions, and the habit of delivering written opinions became exceedingly valuable when he became Chancellor Kent. The powers of the Court were not clearly defined, there was a lack of precedents, and there was only a small coterie of practitioners. All this was altered by Kent's industry, learning, and aptness in conducting the business of the Court. Hence the language of the Bar of New York city, when affectionately taking leave of the retiring Chancellor:—

"During this long course of services, so useful and honourable, and which form the most brilliant period of our judicial history, you have, by a series of decisions, in law and equity, distinguished alike for practical wisdom, profound learning, deep research, and accurate discrimination, contributed to establish the fabric of our jurisprudence on those sound principles that have been sanctioned by the experience of mankind, and expounded by the enlightened and venerable sages of the law."

It is not surprising to know that some have thought that such a man, either from constitutional diffidence, or habits of study, appeared not to feel the confident possession of the powers requisite to insure renown at the Bar. But, as a judge, the Bar gave universal testimony of his personal kindness, pureness, and gentleness of heart, and uniform and uninterrupted course of generous, candid, and polite treatment.—*Current Comment.*

DIARY FOR FEBRUARY.

1. Sat.....Sir Edward Coke born 1552.
2. Sun.....*Septuagesmia.*
3. Mon.....County Court Non-Jury Sittings in York. Hilary Term commences. High Court of Justice Sittings begin.
5. Wed.....W. H. Draper, 2nd C.J. of C.P., 1856.
9. Sun.....*Sexagesima.* Union of U. and L. Canada, 1841.
10. Mon.....Queen Victoria married 1840. Canada ceded to Great Britain, 1763.
11. Tues.....T. Robertson appointed to Chy.Div., 1887.
15. Sat..... Hilary Term and High Court of Justice Sittings end.
16. Sun.....*Quinquagesima.*
18. Tues.....Supreme Court of Canada sits.
17. Wed.....Ash Wednesday.
23. Thu.....Chancery Division High Court of Justice sits.
23. Sun.....*First Sunday in Lent.*
24. Mon.....St. Matthias.
28. Fri.....Indian Mutiny began 1857.

Reports.

ONTARIO.

HIGH COURT OF JUSTICE.

(Reported for THE CANADA LAW JOURNAL.)

FINN *v.* MILLER. RATHBONE *v.* MILLER.

Mechanics' liens- Annulling registration.

Mortgagees had advanced most of their mortgage monies to the mortgagor, for purposes of paying off a prior mortgage and for improvements on the premises, when F. filed his lien for work done and materials provided, and within ninety days began action not making the mortgagees parties. R. also took like proceedings to enforce a lien, and made the mortgagees parties but did not serve them.

The mortgagees, under power of sale, notified F. and R. and other registered lien holders and sold the premises.

On motion of the mortgagees, order was made annulling the registry of all the liens and *lites pendentes*, the mortgagees being ordered to pay such balance of the proceeds of the premises into Court, under the Act respecting the Law and Transfer of Property, as should be in their hands after satisfying mortgage claim and costs.

[CHAMBERS, Nov. 18, 1889—MR. DALTON.

Messrs. J. and W. MacLaren held a mortgage for $6,000, registered 23rd October, 1888, on lands of A. C. Miller, and had advanced for purposes of the loan all but a small portion of the mortgage money when notified on 2nd Feb., 1889, of the filing of a lien by James Finn, who registered his certificate of *lis pendens* on March 9th, 1889. Rathbone also filed lien on Feb. 15th, 1889, and *lis pendens* on April 13th, 1889, making the mortgagees parties, but not serving them. They were not parties in Finn's action. Liens were also filed by other mechanics and material men against Miller and the premises in question.

Messrs. MacLaren, when default was made in payment of interest on their mortgage, gave notice under their power of sale to the mortgagor and all the lien holders and on the 2nd of Nov., 1889, sold the property at auction for a sum in excess of the mortgage debt.

They now applied, showing these facts and that the purchaser required the liens and registration of the two *lites pendentes* to be removed as clouds on the title ; and they so asked.

J. C. Hamilton for the mortgagees :—The applicants should not have been made parties to the lien suits, *McVean v. Tiffin*, 13 A.R., 1.; *Reinhart v. Shutt*, 15 O.R., 325. The liens being registered after the mortgage, are subject to its provisions, and the power of sale having been duly exercised after notice, the holders of liens can now have no right to interfere with the land but at most to stand in the mortgagors position as to any surplus. The Court has authority so to declare and annul the registrations under sec. 30, s.s. 8 of the Mechanics' Lien Act.

Gilray for Finn.

J. H. Reeves for Rathbone.

W. H. Irving, for Watson, another lien holder, objected.

D. Faskin, for a subsequent mortgagee claimed that the balance should be paid to him.

THE MASTER IN CHAMBERS :—The order should go as asked. The thirtieth section of the Act meets the case. The purchaser under the power of sale in this mortgage should not have any cloud upon his title, but the lien holders and all others who may claim the surplus should have opportunity to advance their claims upon it. The order will therefore go annulling all registrations of liens subsequent to the applicants' mortgage, but they to pay into Court in the usual manner under R.S.O., cap. 100, sec. 15, any balance in their hands after satisfying principal, interest, and costs.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

HALDIMAND ELECTION CASE.

Election Law- Corrupt act—Bribery by agent —Proof of agency.

An election petition charged that H., an agent of the candidate whose election was attacked,

corruptly offered and paid $5 to induce a voter to refrain from voting. The evidence showed that H. was in the habit of assisting this particular voter, and that being told by the voter that he contemplated going away from home on a visit a few days before the election and being away on election day, promised him $5 towards paying his expenses. Shortly after the voter went to the house of H. to borrow a coat for his journey, and H.'s brother gave him $5. He went away, and was absent on election day.

Held, that the offer and payment of the $5 formed one transaction and constituted a corrupt practice under the Election Act.

The proof of H.'s agency relied on by the petitioner was that he had been active on behalf of the same candidate at former elections; that he had attended a committee meeting held on behalf of the candidate and took part in going over the list of voters, and that he acted as scrutineer in the election in question. It was also shown that there was no regular organization of the party at the election, but the candidate had addressed a mass meeting of the electors and stated that he placed his interests in their hands. It was contended that every member of the party was therefore constituted his agent.

Held, affirming the judgment of the trial Judge, Ritchie, C.J., dissenting, and Taschereau J., hesitante, that the agency of H. was sufficiently established to make the candidate liable for his acts, and the candidate was rightly unseated for bribery by H.

Appeal dismissed with costs.

Aylesworth for appellant.

McCarthy, Q.C., for respondent.

CHAGNON *v.* NORMAND.

Appeal—Jurisdiction—Supreme Court Act, sec. 29 (b)—Future rights—Quebec Election Act—Action for penalties for bribery—Effect of judgment—Disqualification.

By Art. 414 of the Revised Statutes of Quebec any person guilty of bribery at a provincial election is liable to a penalty of $200 for each offence for which any person may sue.

By Art. 429, any person convicted on indictment of such bribery is disqualified for seven years from being a candidate at an election or holding office under the Crown.

H. brought an action for bribery under Art. 414 against C., in which penalties to the extent of $400 were imposed on C. The Court of Queen's Bench affirmed the judgment imp penalties and C. sought to appeal to th Court of Canada. On motion to qu appeal for want of jurisdiction,

Held, that even if the judgment penalties had the effect of disqualifyin he had been convicted under Art. 429, n would lie. The only ground of juris would be that future rights would be affect the judgment, but under sec. 29 (b) of the preme Court Act the future rights must be affect by the matter actually in controversy and not by something collateral thereto.

Semble, that the judgment would not have the effect of so disqualifying C.

Appeal quashed with costs.

J. J. Gormully for respondent.

Christopher Robinson, Q.C., for appellant.

HOOD *v.* SANGSTER.

Action for partition and licitation of property—Partnership—Plaintiff's interest less than $2,000—Not appealable—R.S.C. ch. 153, sec. 29.

An action was instituted by the respondent against the appellant for the partition and licitation of a cheese factory, etc., in order that the proceeds might be divided according to the rights of the parties who had carried on business as partners. The judgment appealed from ordered the licitation of the factory and its appurtenances. On a motion to quash the appeal by the respondent on the ground that the matter in controversy was under $2,000, the appellant in answer to the respondent's affidavit filed another affidavit showing that the total value of the property was $3,000, but it being admitted that the respondents (plaintiff) claimed but one-half interest in the property, it was

Held, that the matter in controversy and claimed by the respondent not amounting to the sum or value of $2,000, the appeal should be quashed with costs.

Appeal quashed with costs.

Duclos for respondent.

MacLennan, contra.

MONTREAL STREET RAILWAY CO. *v.* RITCHIE.

Injunction—41 Vict., ch. 14, sec. 4, P.Q.—Action for damages—Want of probable cause—Damages other than costs.

Where a registered shareholder of a company

finding the annual reports of the company misleading applies after notice for a writ of injunction to restrain the company from paying a dividend and where, upon such application the company do not deny even generally the statements and charges contained in the plaintiff's affidavit and petition, there is sufficient probable cause for the issue of such writ, and consequently the defendant, who upon the merits has succeeded in getting the injunction dissolved, has no right of action for damages resulting from the issue of the injunction.

Per TASCHEREAU, J. :—Where a party maliciously and without reasonable and probable cause has instituted civil proceedings against another, the latter has a right of action for damages resulting from such vexatious proceedings. *Brown v. Gugy*, 16 L. C. Jur. 227, approved of.

Appeal dismissed with costs.

Geoffrion, Q.C., and *Abbott*, Q.C., for appellants.

Lonergan and *Lafleur* for respondents.

SCAMMELL *v.* JAMES.

Appeal—Jurisdiction—Security for costs—Benefit of bond for—Practice.

S. brought an action by writ of capias in the Supreme Court of New Brunswick against J., who was arrested and gave bail. By the practice in bailable actions in that Province it was necessary for the defendant to enter into special bail within a specified time after his arrest, and judgment must be entered within a specified time after such special bail is entered into. The plaintiff delayed signing judgment, and on application to a Judge in Chambers an order was made discharging the bail and directing an exonoretur to be entered on the bail bond. On motion to the full Court this order was sustained and the plaintiff appealed to the Supreme Court of Canada. The proceedings in the Court below and on appeal were in the original suit against J., and the bond for security for costs was made in favor of J.

Held, that the bail, the parties principally interested in the appeal, not being entitled to the benefit of the security for costs, the appeal could not be entertained for want of security, and the time for giving security having elapsed, the defect could not be remedied.

Held also, that the matter was one of the practice of the Court below and on that ground not appealable.

McLeod, Q.C., and *C. A. Palmer* for the appellants.

I. A. Jack, Recorder of St. John, for the respondent.

WHITE *v.* PARKER.

Appeal—Jurisdiction—Death of plaintiff—New cause of action—Lord Campbell's Act—Actio personalis moritur cum persona.

P. brought an action against a railway conductor for injuries received in attempting to board a train. He was non-suited on the trial of the action, and the Supreme Court of New Brunswick set aside the non-suit and ordered a new trial. Between the verdict and the judgment of the Court below P. died, and a suggestion of his death was entered on the record in the Court below. On appeal to the Supreme Court of Canada from the judgment ordering a new trial,

Held, that by the death of P. a new cause of action arose, under Lord Campbell's Act, in favor of his widow and children and the original action was, therefore, entirely gone and could not be revived. There being, therefore, no cause before the Court the appeal was quashed without costs.

E. McLeod, Q.C., for appellant.

W. Pugsley for respondent.

MCDONALD *v.* GILBERT.

Partnership—Proof of—Names of parties on letter heads—Action for trifling amount.

G. bought goods from a person representing himself as agent of a firm in Toronto, and the goods were sent from Toronto to G. at St. John, N.B. In order to get the goods G. was obliged to pay the freight, which he demanded from the firm, claiming that by his agreement with the agent he was to receive the goods at St. John on payment of the price. Some correspondence passed between G. and the firm, and letters were received by G. written on paper containing the name of the firm and under it the names of individuals. In an action by G. to recover the freight,

Held, affirming the judgment of the Supreme Court of New Brunswick, that the representation of the agent, coupled with the receipt of the

said letters, was sufficient *prima facie* evidence that the persons whose names were printed on the letter heads constituted the said firm.

It appeared that the amount for which the action was brought was only twenty-two dollars, and the Court, though unable to refuse to hear the appeal, expressed strong disapproval of the appellant's course in bringing an appeal for such a trifling amount.

Appeal dismissed with costs.

Weldon, Q.C., for appellants.

Barker, Q.C., for respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Ct.] [Dec. 20.

MEAD *v.* TOWNSHIP OF ETOBICOKE.

Municipal Corporations—Highway carried over railway—Liability of municipal corporation—Liability of railway company—R.S.O., c. 184 s., 531.

Notwithstanding any liability which may be cast by statute upon a railway company to maintain and repair a bridge and its approaches by means of which a highway is carried over their railway, such highway is still a public highway, and as such comes within the provisions of the Municipal Act, R.S.O., c. 184, s. 531, requiring every public road, street, bridge, and highway to be kept in repair by the municipal corporation, who are not absolved from liability for default by the liability, if any, of the railway company.

Laidlaw, Q.C., and *Kappele* for the plaintiff.

Robinson, Q.C., and *McMichael*, Q.C., for defendant Township of Etobicoke.

McCarthy, Q.C., for defendants G. T. R. Co.

Chancery Division.

Full Court.] [Dec. 23.

RE ROMAN CATHOLIC SEPARATE SCHOOLS.

Roman Catholic Separate Schools — Public Schools Act, R.S.O., 1887, c. 225.

In answer to questions submitted by the Minister of Education,

Held, 1. If the assessor is satisfied with the prima facie evidence of the statement made by or in behalf of any ratepayer that he is a Roman Catholic, and thereupon (seeking and having no further information) places such person upon the assessment roll as a Separate School supporter—this ratepayer though he may not by himself or his agent give notice in writing pursuant to section 40 of Separate Schools Act (R.S.O.. 1887, c. 227) may be entitled to exemption from the payment of rates for public school purposes,—he being in the case supposed assessed as a supporter of Roman Catholic Separate Schools.

2. The Court of Revision has jurisdiction on application of the person assessed, or of any Municipal elector (or ratepayer, as in the Separate Schools Act sec. 48 (3), c. 227 R.S.O.) to hear and determine complaints.

(*a*) In regard to the religion of the person placed on the roll as Protestant or Roman Catholic, and

(*b*) As to whether such person is or is not a supporter of public or separate schools within the meaning of the provisions of law in that behalf, and

(*c*) (which appears to be involved in (*b*)) whether such person has been placed in the wrong column of the assessment roll for the purposes of the school tax,

It is also competent for the Court of Revision to determine whether the name of any person wrongfully omitted from the proper column of the assessment roll should be inserted therein upon the complaint of the person himself or of any elector (or ratepayer).

3. The assessor is not bound to accept the statement of, or made on behalf of any ratepayer under R.S.O. 1887, c. 225 sec. 120; (2) in case he is made aware or ascertains before completing his roll that such ratepayer is not a Roman Catholic, or has not given the notice required by section 40 of the Separate Schools Act, or is for any reason not entitled to exemption from Public School Rates.

4. (*a*) A ratepayer, not a Roman Catholic, being wrongfully assessed as a Roman Catholic and supporter of Separate Schools, who, through inadvertence or other causes, does not appeal therefrom is not estopped (nor are other ratepayers) from claiming with reference to the assessment of the following or future year that he is not a Roman Catholic.

(*b*) A ratepayer, being a Roman Catholic and appearing in the assessment roll as a Roman Catholic and supporter of Separate Schools, who has not given the notice in writing of being such supporter mentioned in section 40 of the Separate Schools Act is not (nor are the other ratepayers) estopped from claiming in the following or future year that he should not be placed as a supporter of Separate Schools with reference to the assessment of such year, although he has not given notice of withdrawal mentioned in section 47 of the Separate Schools Act.

Moss, Q.C., for the Attorney-General.

Dr. O'Sullivan, contra.

Robertson, J.] [Dec. 23.

RE IRON CLAY PAVING COMPANY.

Company—Director—Purchase by director of property of company sold under mortgage—Liability to account—Winding up—Constitutional law.

One Turner, a director of the Company, purchased property of the Company in 1888 at a sale by mortgagees of the property for a sum of $8,400, and in 1889 he obtained $23,000 for the same property. In winding up proceedings of the Company under the Dominion Winding Up Act the liquidator claimed that he could not as director purchase for his own benefit, but that he held the land as a trustee for the Company.

Held, affirming the decision of the Master in Ordinary that this contention was correct, and that Turner was liable and accountable for whatever profit he might have received on a sale by him of the lands, and that by reason of his refusing to pay over or to account for such profits he had become properly adjudged guilty of a breach of trust within the meaning of section 83 of the Dominion Winding up Act.

Held, also that the Ontario Winding up Acts do not apply when the application for winding up is made by a creditor on the ground of insolvency, because the local Legislature has no jurisdiction in matters of insolvency.

W. Cassels, Q.C., and *D. McDonald* for Turner.

C. Robinson, Q.C., and LeVesconte for Liquidator.

BOYD, C.] [Nov. 27, 1889.

MACKLIN *et al. vs.* DANIEL *et al.*

Will—Devisee—Investments for legacies—"Paying out"—What time intended—Division of residue.

A testator gave two legacies to become due and payable in three and four years respectively from his decease, and instructed his executors to invest the same and pay the interest to the beneficiaries, and directed the investment of two separate sums for the benefit of two other devisees (one of whom was his sister), with a direction to pay them the interest for their lives, and proceeded, "And should there be a residue or surplus after paying out the foregoing bequests, I will that the same be equally divided between my sisters and S. G. B., or the survivors of them at the time of winding up the affairs."

Held, that the time for the division of the residue was when sufficient funds were invested to produce the legacies and fulfil the directions of the will, and that it was not postponed until the legacies were paid over or to any subsequent time.

A. Cassels for the executors, the plaintiffs.

J. C. Hamilton, for Mrs. S. J. Reesor, a residuary devisee.

W. M. Douglas for the two sisters.

Boyd, C.] [Dec. 20.

PHELPS *v.* ST. CATHARINES & NIAGARA RAILWAY CO.

Railways—Bonds—Debentures—Charge on the "undertaking"—Earnings of Road—44 Vict. c. 73, O. s. 35.

Appeal from an order of the Local Judge at St. Catharines directing an issue between the plaintiffs who sought to attach certain moneys of the defendants, being a bank deposit of moneys collected from the earnings of the Road on the one part, and the bond holders of the defendants who claim a charge upon said moneys on the other part.

The Act of Incorporation of the defendants Railway, 44 Vict. chap. 73, O. sec. 33, enacted that the bonds of the defendants were to be "taken and considered to be the first and preferential claims and charges upon the undertaking."

Held, that the bond holders under the above section were entitled to a preferential charge

upon the above deposit. In Railway parlance the "undertaking" has been defined to mean the complete work from which returns of money or earnings arise, and a charge upon the undertaking means that these earnings are liable for the satisfaction of the charge.

Aylesworth, for the appellants.

Collier, contra.

OSGOODE HALL LIBRARY.

(Compiled for the Canada Law Journal.)

Latest additions:

American and English Encyclopædia of Law vol. 10, implied trusts—injunctions, Northport, 1889.

Ball's Irish Legislative Systems, (1172-1800) Dublin, 1889.

Barron's Conditional Sales Act, Toronto, 1890.

Beven on Negligence, London, 1889.

Birdseye's New York Revised Statutes, vol. 1., N.Y. 1889.

Brown and Powles on Divorce, 5th ed., London, 1889.

Carter on the Provinces of the Written and Unwritten Law, New York, 1889.

Carpmael's Patent Laws, 2nd ed., London, 1889.

Clerk and Lindsell's Law of Torts, London, 1889.

Daniel's Commission Cases, London, 1889.

Dicey on the Constitution, 3rd ed., London, 1889.

Elphinstone on Interpretation of Deeds, (bl. ed.) Philadelphia, 1889.

Fraser on Libel, London, 1889.

Gover on Advising on Titles, London, 1889.

Halkett and Laing's Dictionary of Anonymous Pseudonymous Literature, etc., four vols., Edinburgh, 1882-8.

Harris on Criminal Law, 5th ed., London, 1889.

Herbert on Adulteration, London, 1884.

Jordan's Analysis of Anson on Contract, Cincinnati, 1890.

Kelly on Newspaper Libel, London, 1889.

Kenyon (Lord) Life of, edited by G. T. Kenyon, London, 1873.

Lely and Peck's Precedents of Leases, London, 1889.

Marcy and Dodd on Originating Summons, London, 1889.

Mews' Consolidated Digest, 1884-8, London, 1889 (3 copies).

Montgomery's Land Tenure in Ireland, Cambridge, 1889.

Munro's Constitution of Canada, Cambridge, 1889.

Osborne on Trusts, London, 1889.

Owen's Declaration of War, London, 1889.

Phillips' Comparative View of Criminal Jurisprudence, Calcutta, 1889.

Smith's Equity Jurisprudence, 14th ed., London, 1889.

Snell's Equity, 9th ed., London, 1889.

Snow's Annual Practice, 1889-90, London, 1889.

Southeastern Reporter, volumes 1-8, St. Paul, 1887-9.

Southwestern Reporter, volumes 1-10, St. Paul, 1887-9.

Townshend on Libel and Slander, 4th ed., New York, 1890.

Urlin and Shearwood on Income Tax, London, 1888.

Wheaton on International Law, 3rd ed., London, 1889.

Winslow on Artistic Copyright, London, 1889.

Wynne's Boville Patent, London, 1873.

NOTE.—Additional copies of the books on the law course have been added to the Students' Lending Library, in the east wing, Osgoode Hall.

Appointments to Office.

COUNTY JUDGE.

Wentworth.

Alexander Bruce, of Hamilton, to be Deputy-Judge of the County Court of the County of Wentworth.

REGISTRARS.

York.

Peter Ryan, of Toronto, to be Registrar of Deeds in and for the Registry Division of East Toronto, such appointment to take effect on and from the 1st day of January, 1890.

Province of Ontario.

Sutherland Malcolmson, of Goderich, to be Deputy-Registrar of the Maritime Court of Ontario, *vice* Henry McDermott, deceased.

POLICE MAGISTRATES.

Brant.

Thomas Woodyatt, of Brantford, to be Police Magistrate in and for the City of Brantford, *vice* James Weymess, deceased.

Dundas.

William Bow, of West Winchester, to be Police Magistrate in and for the Village of West Winchester, in the County of Dundas.

Essex.

Alexander Bartlet, of Windsor, to be Police Magistrate in and for the North Riding of the County of Essex (saving and excepting the Township of Anderton) as constituted for the purposes of the Legislative Assembly, and in and for the Township of Tilbury West in the South Riding of the said County of Essex.

CORONERS.

Haldimand.

David Thompson, of Cayuga, Doctor of Medicine, to be an Associate-Coroner within and for the County of Haldimand.

Stormont, Dundas, and Glengarry.

Watson Parish Chamberlain, of Morrisburg, Doctor of Medicine, to be an Associate-Coroner within and for the united counties of Stormont, Dundas, and Glengarry.

DIVISION COURT CLERKS.

Bruce.

Angus Martyn, of Ripley, to be Clerk of the Ninth Division Court of the County of Bruce, *vice* Angus McKay, resigned.

Haldimand.

David T. Rogers, of Cayuga, to be Clerk of the Second Division Court of the County of Haldimand, *vice* Thomas Bridger, resigned.

Northumberland and Durham.

Soford F. Dixon, of Colborne, to be Clerk *pro tempore* of the Seventh Division Court of united counties of Northumberland and Durham, the appointment not to continue longer than six months.

Wellington.

John Livingstone, of Harriston, to be Clerk of the Tenth Division Court of the County of Wellington, *vice* A. C. R. Saunders, resigned.

DIVISION COURT BAILIFFS.

Essex.

William L. Hughson, of Harrow, to be Bailiff of the Fourth Division Court of the County of Essex, *vice* George Pearce, resigned.

Leeds and Grenville.

Harvey Edwin Lawrence, of Spencerville, to be Bailiff of the Tenth Division Court of the united counties of Leeds and Grenville, *vice* P. Snyder, resigned.

Middlesex.

Lorenzo Winchester Stevens, of London, to be Bailiff of the Ninth Division Court of the County of Middlesex, *vice* Isaac Nixon, resigned.

Simcoe.

Geo. A. Nolan, of Tottenham, to be Bailiff of the Third Division Court of the County of Simcoe, *vice* S. H. Washburn, resigned.

Wellington.

Henry Torrance, of Harriston, to be Bailiff of the Fourth Division Court of the County of Wellington, *vice* John Livingstone, resigned.

COMMISSIONERS FOR TAKING AFFIDAVITS

Dominion of Canada.

Robert Tuthill Litton, of Melbourne, Victoria, Australia, to be a Commissioner under R.S.C., c. 135, sec. 92, to administer oaths and take and receive affidavits, declarations, and affirmations in or concerning any proceeding had or to be had in the Supreme Court of Canada or in the Exchequer Court of Canada.

Province of Ontario.

Joseph Grose Colmer, of London, England, to be a Commissioner for taking affidavits within and for the United Kingdom of Great Britain and Ireland for use in the Courts of Ontario.

Geo. William Burton, of No. 7 Queen Street, Cheapside, England, to be a Commissioner for taking affidavits within and for the City of London and not elsewhere, for use in the Courts of Ontario.

Miscellaneous.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for the weeks ending Jan. 25th and Feb. 1st, contain Robert Browning, Brazil, Past and Future, and A Lumber-Room, *Contemporary;* Pope, and Robert Browning, *National;* Cardinal Lavigerie and the Slave-Trade, A Winter's Drive from Sedan to Versailles and round Paris during the Siege, Browning and Tennyson, and In the Days of the Dandies, *Blackwood's;* The Romance of History, Jacqueline de Laguette, *Temple Bar;* Strangers Within our Gates, *Cornhill;* The Father of Low-German Poetry, Granville Sharp

and the Slave-Trade, and A Ballad of East and West, *Macmillan's;* Children and the Poets, *Leisure Hour;* The Cats of Ancient Egypt, *English Illustrated Magazine;* Housekeeping in Crete, *All the Year Round;* The Intellectual Effect of Old Age, *Spectator;* Browning's View of Life, *St. James';* with "The Green Door," "Zoe," and Poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Law Students' Department.

TRINITY TERM, 1889.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School, Osgoode Hall, Toronto.

Those Students-at-Law and Articled Clerks, who under the Rules are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be the most necessary for the guidance of the Student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.
Lecturers, E. D. ARMOUR. A. H. MARSH, LL.B.
Examiners R. E. KINGSFORD, LL.B. P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1860, fourteen Scholarships in all will be offered for competition, seven for those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students.

Unless required to attend the school by the rules just referred to, the following Students-at-

Law and Articled Clerks are exempt from attendance at the School:

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hiliary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum:

CURRICULUM.

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.

Hawkins on Wills.

Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.

Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.

Pmith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.

Smith's Mercantile Law.

Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

VOL. XXVI. FEBRUARY 17, 1889. No. 3

A CORRESPONDENT draws our attention to Con. Rule 482, which he says embodies the most summary proceeding known to the Canadian practitioner. It reads thus: "On every appointment the party on whom the same is served shall attend such appointment *without waiting for a second*, or in default," etc.

IT is gratifying to see an improvement in the Ontario Reports, in this that the judges have got into the better way of shortening their judgments. It was once wittily said, we are informed, by the chief of the Q.B. Division, speaking of one of the judges at Osgoode Hall celebrated for the expenditure of many words in his judicial utterances, that the length of his judgments depended entirely upon the thickness of the pad of paper he began to write upon. We can fancy that his reporter often devoutly wished that he would be more economical in his stationery. We are indebted to some of the more recent appointments for giving a good example in this respect.

THE decision of the Common Pleas Divisional Court in *Canada Cotton Co.* v. *Parmalee*, noted ante p. 32, seems somewhat at variance with the decision of the Court of Appeal in *Haggin* v. *Comptoir D'Escompte de Paris*, 23 Q. B. D., 519, noted ante p. 8. It is true that the decisions are founded upon two different Rules, but the principle of the decision ought, it appears to us, to be the same in each case. In *Haggin* v. *Comptair D'Escompte de Paris* the question was whether a foreign corporation aggregate carrying on business in England could be served with a writ of summons in the same manner as an English corporation aggregate, and the Court held that it could, on the ground that a corporation may be said to be resident wherever it carries on business, in which respect it differs from a mere private partnership, as was pointed out in *Russell* v. *Cambefort*, 23 Q.B.D., 526, also noted ante p. 8. In *Canada Cotton Co.* v. *Parmalee*, the question was whether a foreign corporation doing business in Ontario was "within Ontario" within the meaning of Rule 935, and the Court held that it was not. In *Haggin* v. *Comptoir D'Escompte de Paris* the Court of Appeal was of opinion, as we have seen that a foreign corporation aggregate may be said to be resident wherever it carries on business, and if that is correct, then it would seem to follow that a

foreign corporation aggregate carrying on business in Ontario ought to have been held to be "within Ontario" within the meaning of Rule 935; probably the decision of the Court of Appeal was not before the Divisional Court, or it might have come to a different conclusion.

THE FIDUCIARY RELATION OF DIRECTORS TO SHAREHOLDERS.

A late writer on Joint Stock Companies says: "In America the cases involving a breach of trust by directors arise generally out of the management of corporations, and not in their formation. These cases frequently involve colossal transactions, and exhibit a scope, grasp, and ability for management and manipulation that excite the stockholder's admiration fully as much as his indignation. Corporations become insolvent, and stockholders lose their investments, while individuals become millionaires. Illegitimate gains are secured, and enormous fortunes are amassed, by the few at the expense of the defrauded, but generally helpless, shareholders. The expense, difficulties, and delays of litigation and the fact that the results of even a successful suit belong to the corporation and not to the stockholder who sues, all combine to baffle investigation and exposure, to discourage the stockholders, and to encourage and protect the parties guilty of the wrong."

Fortunately, for the reputation of Canada, such a commentary on the actions and policy of Canadian directors cannot yet be written. The wrongdoings of directors in this country partake more of the offence of *crassa negligentia*, than *mala fides*. It may be that congenial co-conspirators have not yet been gathered around the directors' tables in the Board rooms of our corporations: or it may be that our corporate organizations have not yet called forth men of the skill, audacity and talent of the quality that could systematize into recognized methods, schemes for diverting the profits, capital, and even the existence of the corporation, to the enrichment of the directors and their secret agents, as have been produced among our neighbors in the United States, and occasionally in England.

The most striking feature of our era of modern industrial development, is the organization, power, and wealth of joint stock companies for mercantile or financial undertakings. Since the South Sea Bubble of 1720, which was so disastrous to the reputation of some of the then chief ministers of the Crown, and members of Parliament, there have been cases of bubble companies and plundering promoters. The judicial records of England and the United States supply many actual and constructive cases of frauds perpetrated by directors, promoters, and their secret agents, under which a system of jurisprudence has become recognized as a distinct branch of "Company law." That branch of the law which deals with the fiduciary relations of directors to their shareholders has been largely promulgated under what is known as the "judicial process," rather than the legislative process, of law making. It is in great measure in a

formative state, and is being developed by the *mala fide* and *ultra vires* actions of the directors and officers of railway, mercantile, and banking corporations.

Before dealing with the duties and responsibilities of directors, it will be proper to consider the position they occupy towards the company and its shareholders.

An incorporated company has no visible personality. It is defined to be an "invisible body which cannot manifest its will by oral communications." It can only be an acting person in its commercial transactions through its directors; and while so acting, its directors occupy the position of (1) Agents of the company in regard to its dealings with the public ,and as such are within the rules of the law of Principal and Agent. The directors are also (2) Trustees and managing agents for the shareholders of the corporate powers and business committed to them. In their representative character as agents of the company, they rarely incur personal responsibility in respect of contracts made by them on behalf of the company with third parties. But as trustees or managing agents for the shareholders, they are personally responsible for any breach of trust or duty which is cognizable by the law governing Trustees.

Originally the only pledge or security which beneficiaries had for the due execution of a trust, was the good faith and integrity of the trustee. But it was soon found that the pledge of his sense of honor, when placed in conflict with the trustee's self-interest, proved an extremely precarious security. There were no statutes defining and making obligatory good faith or integrity in trustees; but by the judicial process of legislation, those principles and rules of natural justice which are sometimes called rules of equity or public policy, were made applicable to trusts, so as to give validity to the trustee's original pledge ; and thereupon the courts assumed jurisdiction to enforce its specific performance. "The rules which govern fiduciary relations are equitable rules unknown to the English Courts of law. They are bottomed in the plain maxims of good sense and equity: *Aberdeen Ry. Co.* v. *Blaikie*, 1 Macq. H.L., 461. By an extension of the judicial process, directors of commercial corporations have, in matters affecting their shareholders, been brought under the law of fiduciary relations, and the term "director," has been interpreted as synonymous with that of "trustee."

Lord Romilly, M.R., thus states the law: "Directors are persons selected to manage the affairs of the company for the benefit of the shareholders. It is an office of *trust*, which, if they undertake, it is their duty to perform fully and entirely." And again: "Above all, on no principle could they derive to themselves directly or indirectly, any personal or pecuniary advantage:" *York and North Midland Ry. Co.* v. *Hudson*, 16 Beav. 491, 496. In another case the same learned judge said: "I look upon directors of a company as trustees for the benefit of the shareholders, and is it in that character and quality they accept office, with all its corresponding duties and liabilities. It sometimes happens that directors have individual interests conflicting with their duties as trustees of a company. In such cases they are bound to consider, before they accept the office of directors, whether they are prepared to make their duties as directors dominant over their personal interests, and to make their individual

interests subordinate to their duties and liabilities as trustees:" *Ex parte Bennett*, 18 Beav., 339.

These rules of law were enforced during the great railway mania in England, against such men as Sir George Hudson, the "Railway King," and Sir William Magnay and others.

In giving judgment against the latter, the Master of the Rolls remarked as to the former: "Hudson was held bound to give to his company, the benefit of a large contract entered into by him, for *iron* which had been used in the railway, and to account to them for the pecuniary profit which he had derived from it. *In fact*, (said Lord Romilly), *there is no mode by which any species of sale or dealing between the company and one of its directors can be made valid and effectual*, except by bringing the circumstances fully before a meeting of the shareholders, and first obtaining their sanction to the transaction:" 25 Beav., 586. The House of Lords gave a similar opinion in the Scotch case of *Aberdeen Ry. Co.* v. *Blaikie*, 1 Macq. H.L., 461, and held that a director of a company is a trustee, and as such is precluded from dealing on behalf of the corporation with himself, or with a firm of which he is a partner. So inflexible is the rule, said Lord Cranworth, that though the terms of the dealing are as good, or even better, than could have been obtained from any other quarter, no question of fairness or unfairness is allowed to be raised, if the beneficiaries object. The contrast is illegal in equity, upon general equitable principles: s. c. 2 Eq. Rep. 1281.

Some directors, from ignorance of the law, deal openly with their company; while others ingeniously cover the prohibited dealing in a cloak of apparent righteousness; but the "strong arm of the law" is always sufficiently muscular to tear the cloak and expose the hidden fraud. Secret gifts, or percentages, or commissions from persons having dealings with corporations; sales or purchases or contracts in the name of a secret agent, are all within the prohibition of the law. The general propositions we have discussed may be illustrated by the following decisions.

Directors contracting with company.—If a director of a company makes a contract with his company, and reserves a private interest, or subsequently becomes interested in any contract with a view of his participating in the profits, the shareholders may insist upon his accounting for the profits, or may disaffirm the contract *in toto*; and the same rule applies to directors of a company becoming members of another company with which they have made a contract, so as to share in the profits of such contract. It is a breach of duty in directors to assume obligations inconsistent with their trust, or to place themselves in a position where their personal interests will prevent them from acting for the best interests of those they represent as directors: *Gilman, etc., Ry. Co.* v. *Kelly*, 77 Ill., 426.

Purchase of Corporate Property.—Nor can a director purchase the corporate property at a sale under a mortgage, or execution, or at a sale for taxes, either in his own name or in the name of an agent. And third persons who may purchase the corporate property from such director, with notice, stand in no better position than the director himself. A director cannot be allowed to unite in

himself the two opposite characters of buyer and seller; nor purchase on account of another that which he sells on his own account: *Cook on Stockholders*, s. 653.

Leases between Director and Company.—Nor can a lease between a director and his company be enforced. Where a firm of which a railway director was a member obtained a lease of a refreshment saloon from his company, and assigned it to a third party, and the company then removed their station to another locality, the assignee of the director's firm was held entitled to no relief. Giffard, V. C., said: The plaintiff can have no greater rights, and can stand in no better situation than his assignor; and it is perfectly clear from the statute, and the decisions in the House of Lords, that his assignor, having been a director of the company at the time of entering into the lease with the company, could not have maintained a bill for specific performance against the company: *Flanagan* v. *G. W. Ry. Co.*, 19 L.T.N.S., 345, s.c., L. R., 7 Eq., 116.

Commission for services.—Moneys paid over to two directors (chairman and vice chairman), of a bank, and to the manager (not a director), for services in promoting the amalgamation of their bank with another, were ordered to be refunded to the bank, subject, however,to deduction in the case of the manager, who was to be allowed a reasonable compensation for the loss of his office of manager: *General Exchange Bank* v. *Horner*, L. R. 9., Eq. 480.

Directors selling to the Company.—The promoters of a company who were also directors, purchased land and sold it to their company at an increased price, retaining the difference for themselves. Part of the purchase money was paid in debenture bonds. After the company had gone into liquidation, another director purchased, at a large discount from the first named directors, some of the debentures issued to them for the purchase money of the land. The director alleged that he knew nothing of the profit, or "salting," in the purchase; but the Court held that it must attribute to him, as a director, all the knowledge which by reasonable diligence he would have acquired, and that by reasonable diligence he might have found out all about the transaction, and that the debentures were corruptly and improperly issued. The Court then intimated that his claim should be disallowed unless he accepted the offer, which had been made at the hearing, of the amount actually paid by him for the debentures: *Ex parte Larking*, 6 Ch.D., 566. This judgment contains some sharp comments, which it would be beneficial to some directors to read. The same rule applies to the sale of any other kind of property to his company by a director, at a profit to himself: *Redmond* v. *Dickerson*, 9 N.J., Eq. 507.

Profits made by the Partner of a Director.—One Coleman, a director in a company, had a partner, Knight, who was not in any way connected with the company. The firm had a business transaction with the company, on which a profit was made by the partnership. The House of Lords held that the partners (director and non-member), were liable to make good to the company the profits received by the firm. Lord Chelmsford considered that the partner should be held to know the law, and dealt with his case thus: If Knight had been ignorant that the money which was brought into the partnership, was

money obtained by his partner by a dereliction of duty, and that it was in law the money of the company, he might have had a good defence. But he was acquainted with the whole transaction from first to last. He knew where the money which was brought into the partnership came from, and that it could not belong to his co-partner. With all this knowledge, his liability cannot be separated from that of Coleman: *Liquidators Imperial Mercantile Credit Association* v. *Coleman*, L.R., 6 H.L., 189.

A similar prohibitory law applies to the dealings of officers of a corporation, especially where the officer comes within the definition of "agent."

Secret Contracts.—A contract was made between two companies for the laying of a cable, in which there was a condition that the work should be approved of and certified by the engineer of the cable company, who was to be paid a commission of one and a quarter per cent. on the company's outlay. It was discovered that the engineer had a secret sub-contract with the construction company that he should lay the cable himself for a fixed sum. The Court set aside the contract, and ordered a refund of the moneys paid under it: *Panama, etc., Telegraph Co.* v. *India rubber, etc., Works Co.*, 32 L.T.N.S., 238, 517.

Purchases of corporate property.—The Courts of the United States have held that the disqualifications to as applicable to directors, attach to certain officers of the company, other than the president and directors, and that purchases by them of the corporate property at an execution sale, is a purchase for the benefit of the company: *Cook on Stockholders*, s. 653. T. H.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for December are continued:

ACTION OF DECEIT—MISREPRESENTATION—FRAUD—COMPANY—MISREPRESENTATION IN PROSPECTUS.

Derry v. *Peek*, 14 App. Cas. 337, is the action which was known as *Peek* v. *Derry* in the Courts below, and the decision of which by the Court of Appeal, 37 Chy.D. 541, we noted ante vol. 24, p. 294. The action it may be remembered was brought by the plaintiff to recover damages against the directors of a company for misrepresentations contained in the prospectus, in consequence of which the plaintiff was induced to become a shareholder. The Court of Appeal overruling Stirling, J., held the plaintiff entitled to succeed, but the House of Lords after a very full discussion of the principles governing the case have reversed the judgment of the Court of Appeal and restored that of Stirling, J., their lordships holding that it was incumbent on the plaintiff in such an action to establish actual fraud, either by showing that the representation was made knowing that it was false, or without belief in its truth, or recklessly without caring whether it was true or false. And a statement made carelessly, though in the honest belief that it was true, is not fraudulent. The misrepresentation in this case was that the company was entitled to operate a tramway by steam power, whereas the right to do so depended on their obtaining the consent of the Board of Trade,

which consent the Board subsequently refused to give. Lord Herschell in his elaborate judgment points out that an action for deceit differs essentially from an action for a rescission of a contract on the ground of misrepresentation, in which latter case the proof of the untruth of the representation and that it was material is sufficient to warrant the company in rescinding the contract, although the representation may have been made *bona fide*.

PRACTICE—SECOND ACTION FOR SAME MATTER—COSTS OF FORMER SUIT—STAYING PROCEEDINGS.

McCabe v. *Bank of Ireland*, 14 App. Cas., 413, is a decision of the House of Lords on a question of practice. The plaintiff had brought a former action against the same defendants for the same cause which had been dismissed with costs; without paying the costs, he commenced the present suit, whereupon the defendants applied to stay all proceedings until the costs of the former suit were paid, and the plaintiff made a cross motion to be permitted to prosecute the suit in *forma pauperis*. The Court below stayed the proceedings and refused the plaintiff's motion, and the House of Lords affirmed the decision.

STATUTE OF LIMITATIONS—PAYMENT OF INTEREST—EVIDENCE.

In *Newbould* v. *Smith*, 14 App. Cas., 423, the House of Lords affirmed the decision of the Court of Appeal, 33 Chy.D. 127, noted vol. 22, pp. 317, 413, but not for the reasons given by that Court, but on the ground that even assuming the entry of the payment of interest to be admissible, there was no evidence to connect the entry with the property in question. The importance of this case to mortgagees has already been dwelt on ante vol. 22, p. 307.

VENDOR AND PURCHASER—RESCISSION THROUGH DEFAULT OF PURCHASER—FORFEITURE OF DEPOSIT—DEFECT IN TITLE SUBSEQUENTLY DISCOVERED.

Soper v. *Arnold*, 14 Appeal Case, 429, was an appeal from the decision of the Court of Appeal 37 Chy.D. 96, noted ante vol. 24, p. 143, in which it was held that when a contract for the sale of land was rescinded after the title had been accepted, in consequence of the default of the purchaser, and his deposit was consequently forfeited, he had no right to recover the deposit on the ground of mutual mistake and failure of consideration, because, on a subsequent sale it turned out that the vendor's title was bad, owing to a defect which appeared on the face of the abstract delivered to the first purchaser. This decision was affirmed by the House of Lords.

STATUTE OF LIMITATIONS—ACTION TO RECOVER LAND—POSSESSION AS AGENT FOR UNKNOWN HEIR AT LAW—RATIFICATION BY TRUE OWNER—EVIDENCE.

Lyell v. *Kennedy*, 14 App. Cas., 437, may be considered to have at last terminated its well litigated course by the judgment of the House of Lords in favor of the plaintiff, whereby many interesting legal questions have been also passed upon. The defendant had acted as the agent of the owner of the lands in question during her lifetime, and on her death in 1867 continued to receive the rents and profits, and to pay them into the bank exactly as before, not informing the

tenants of his principal's death, but stating to several persons that he was acting as agent and receiver for the true heir whoever he might be. The defendant thus acted until 1880, when, more than twelve years having elapsed since his principal's death, he claimed the property on his own account. In 1881 the assignee of the heir brought this action. The House of Lords have now determined, reversing the decision of the Court of Appeal, 18 Q. B. D., 796, noted ante vol. 23, p. 247, and restoring the decision of Stephen, J., that the defendant having constituted himself agent for the heir he could not dispossess the heir so as to put him to his action, and that his acts as agent, though unauthorized, might be ratified by the true owner, and were ratified by the plaintiff bringing his action within a reasonable time after the heir was ascertained, and that the plaintiff was thereupon entitled to judgment for recovery of the land, and for an account of the rents and profits. Scotch parish registers, or certified extracts from them, receivable in Scotch Courts as evidence as being kept under the sanction of public authority, were held to be receivable in English Courts as to matters properly and regularly recorded in them; and proceedings in the Scotch Sheriff's Court were also held admissible as to matters of pedigree on the same principle on which answers and decrees in chancery have been admitted in the House of Lords in peerage cases, the facts of the pedigree not being in dispute but only incidentally stated in the proceedings.

COLLISION—DAMAGES, MEASURE OF—LOSS OF PROFITS—REMOTENESS OF DAMAGE.

In *The Argentino*, 14 App. Cas., 519, the House of Lords affirmed the decision of the Court of Appeal, 13 P. D., 191, noted ante vol. 25, p. 12, holding that in estimating damages occasioned by a collision, the loss of profit represented by the ordinary and fair earnings of such a ship as the injured vessel, having regard to the fact that a contract had been entered into for her to proceed upon another voyage, were not too remote, and flowed directly and naturally from the collision.

COMPANY—WINDING UP—CAPITAL PARTLY PAID UP—PREFERENCE SHAREHOLDER—SURPLUS ASSETS, DISTRIBUTION OF.

Birch v. *Crapper*, 14 App. Cas., 525, was reported in the Court below as *In re Bridgewater Navigation Co.*, 39 Chy.D., 1, noted ante vol. 24, p. 523. The only point decided by the House of Lords is the question as to the proper distribution of the surplus assets of the Company. The undertaking of the company was sold under an act which made no provision for the distribution of the purchase money, and the articles of association contained no provision on the subject. There were two classes of shareholders, one class preference shareholders, whose shares were fully paid up; the other class were ordinary shareholders, whose shares were not fully paid up. In the Courts below it had been held that the surplus assets were distributable among these two classes of shareholders in proportion to the amounts paid on their respective shares; but the House of Lords has reversed this decision, and has adjudged that the surplus is divisible among all the shareholders, not in proportion to the amount paid up, but in proportion to the shares held by them respectively.

PRACTICE—SPECIAL LEAVE TO APPEAL TO PRIVY COUNCIL.

The only point for which it will be necessary to notice *St. John's* v. *Central Vermont Railway Co.*, 14 App. Cas., 590, is one of practice. The appellant had obtained special leave to appeal to the Privy Council on the ground that the appellant desired to raise a particular question of great and general importance, and on the argument of the appeal the Judicial Committee refused to permit the the appellant to contend that no such question arose, and that the case turned upon a question of fact, on which the Court below was in error.

STATUTE—CONSTRUCTION OF—BONA FIDE PURCHASER.

Mutual Provident Society v. *Macmillan*, 14 App. Cas., 592, is a decision of the Judicial Committee upon the construction of a Statute of New South Wales. The act in question enacted that a declaration made by an attorney that he has no notice of the revocation of his power by death or otherwise, is conclusive proof of non-revocation, when made to a *bona fide* purchaser for valuable consideration without notice. The Judicial Committee (affirming the Colonial Court) held that a general verdict against a purchaser in an action to recover the property, was justified by evidence to the effect that the purchaser had cause to suspect, and did suspect, the truth of the declaration.

GENERAL AVERAGE—JETTISON—RIGHT TO CONTRIBUTION—REMEDIES OF OWNERS ON GOODS JETTISONED—LIEN ON GOODS SALVED.

Steel v. *Scott*, 14 App. Cas., 601, is an important contribution to the exposition of the maritime law relating to jettison. In this case the Judicial Committee lay down the following principle: That when goods are jettisoned the right of contribution for the loss of such goods as against the owners of goods salved does not extend to those by whose fault the safety of the ship has been imperilled and the jettison rendered necessary. Thus when the ship was stranded through the negligence of the master, it was held that the owners of the ship are not entitled to general average with innocent owners of the jettisoned cargo; unless their ordinary relations to the shippers have been varied by contract. Their Lordships also hold that each owner (other than those in default) of jettisoned goods becomes a creditor of ship and cargo salved, and that he has a direct claim against the owners of the ship and cargo respectively, for a *pro rata* contribution towards his indemnity which he can recover by direct action, or by enforcing through the ship master, who is his agent for that purpose, a lien on each parcel of goods salved to answer the proportionate liability. It may be well to note that the proposition laid down by Parsons in his Law of Insurance, vol. 2, p. 285, and in his Law of Shipping, vol. 1, p. 211, to the effect that when the jettison is rendered necessary through the default of the ship master, there is no claim for contribution, but that the owners alone are liable to make good the loss, was disapproved by their Lordships as not being supported by authority.

RIPARIAN RIGHTS—RAILWAY COMPANY—EXPROPRIATION OF LANDS—RIGHT OF ACTION.

In *North Shore Railway Co.* v. *Prior*, 14 App. Cas., 612, the Judicial Committee on appeal from the Supreme Court of Canada, discuss the rights of riparian proprietors, along whose river frontage a railway company constructs an embankment for its railway without making compensation, and holds that the company in question were liable to damages to the riparian proprietors, and that the making of openings through the embankment was no answer to the claim for indemnity—and following *Parkdale* v. *West*, 12 App. Cas., 602, that as the company had not taken the steps necessary under the statute to vest in them the power to do the thing for which compensation would have been payable under the Act, the parties injured were entitled to sue for damages and for the removal of the obstruction, and that, if the removal of the obstruction was not ordered, damages for a permanent injury to the land would be recoverable.

PRACTICE—SPECIAL LEAVE TO APPEAL FROM THE SUPREME COURT OF CANADA.

The only case which remains to be noted is *Montreal* v. *Seminaire de St. Sulpice*, 14, App. Cas. 660, in which an application was made to the Privy Council for special leave to appeal from a decision of the Supreme Court of Canada—exempting the respondents from the payment of a tax specially assessed by the appellant corporation. This their Lordships refused to grant, because the exemption was allowed under a statute which did not appear to have been erroneously construed, and although the case was of great public interest and raised an important question of law, yet there did not appear to be any sufficient doubt as to the correctness of the decision complained of to justify leave being granted.

The Law Reports for January comprise 24 Q.B.D., pp. 1-140: 15 P.D., pp. 1-15, and 43 Chy.D, pp. 1-98.

CHARGE UPON THE LAND—LOCAL IMPROVEMENTS—STATUTE OF LIMITATIONS (37 & 38 VICT., C. 57) S. 8 (R.S.O., C. 111, S. 23).

Hornsey v. *Monarch Investment Society*, 24 Q.B.D., 1, deserves attention. By statute certain paving expenses, which had been incurred by a municipal body, were made a charge upon the premises in respect of which they were incurred. The Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.), affirming the Divisional Court (23 Q.B.D., 149) held, that these expenses became a charge upon the completion of the works, and that the period of limitation in respect of such charge under the Real Property Limitation Act (37 & 38 Vict., c.57) s. 8, (R.S.O., c. 111, s. 23) began to run from that date, and not from the date of the apportionment of such expenses among the frontagers. It was contended that the words "present right to receive the same" in this statute are equivalent to "present right to enforce payment of the same," but it was pointed out by the Court that such a construction would put it in the power of the municipal body to delay the application of the Statute of Limitations to any time they pleased; and that notwithstanding no apportionment had been made, they had a present right to

receive and, if they considered enough had been tendered, to give a discharge therefor.

PROMISSORY NOTE PAYABLE ON DEMAND—NEGOTIABLE INSTRUMENT—MORTGAGE BY WAY OF FURTHER SECURITY OF DEBT SECURED BY NOTE—TRANSFER OF NOTE AFTER RECEIPT OF AMOUNT DUE THEREON—INDORSEE FOR VALUE WITHOUT NOTICE—RE-ISSUE OF NOTE, WHAT AMOUNTS TO.

In *Glasscock* v. *Balls*, 24 Q.B.D., 13, an attempt was made to defeat the claim of a *bona fide* indorsee for value of a promissory note payable on demand, under the following circumstances: The note was given by the defendant to one Wayman, and as a further security for the debt represented by the note, he also gave him a mortgage on certain property. Wayman transferred the mortgage to one Hall, and received from him sufficient to pay the debt due on the note. He afterwards transferred the note to the plaintiff for value, as security for a debt due by him to the plaintiff. On the part of the defendant it was argued that the case was within *Bartrum* v. *Caddy*, 9 Ad. & E. 275, as being a re-issue of the note after it had been paid out of the proceeds received from the transfer of the mortgage. But the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) were of opinion that the plaintiff could not be said to have taken a note over due, because there was no proof of any demand of payment having been made under it, and therefore, being an indorsee for value, he was *prima facie* entitled to recover, and that *Bartrum* v. *Caddy* did not apply because the note had not been paid, and secondly, the note could not be said to have been re-issued after payment, because it never came back to the power or control of the maker. The appeal from the decision of Lord Coleridge, C.J., was therefore dismissed.

PENAL ACTION—OMISSION TO COMPLY WITH STATUTORY DIRECTIONS.

Smith v. *Wood*, 24 Q.B.D., 23, was an action to recover penalties for delivering coal short of weight. The statute imposing the penalty required the sacks to be weighed both "with and without the coal therein;" this method of weighing had not been followed, and it was consequently held by the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.), affirming the judgment of Q.B. Divisional Court, 23 Q.B.D., 380, that the plaintiff was not entitled to recover.

EXPROPRIATION OF LAND BY RAILWAY CO.—COMPENSATION—"LAND INJURIOUSLY AFFECTED"—OBSTRUCTION OF LIGHTS—MEASURE OF DAMAGE.

Re London, Tilbury & S. E. Railway Co., and Gowers Walk Schools, 24 Q.B.D., 40, was an arbitration arising out of the expropriation of land by a railway company, in consequence of which the owner of neighboring lands claimed compensation for "lands injuriously affected" by the expropriation. The claimant, being the owner of certain buildings with ancient lights, pulled them down and erected a new building on their site. The position of some portions of the windows in the new building coincided with that of portions of the old windows, while others of the new windows occupied wholly different positions. Before any prescriptive right to the access of light to the new windows had been acquired, a railway company, in pursuance of their statutory powers, erected a

warehouse which obstructed the lights in the claimants' new building. Upon a case stated by the arbitrator, Mathew and Wills, JJ., were of opinion that the claimant was entitled to compensation in respect of the whole of the windows so obstructed, including the windows and portions of windows which did not coincide with any of the ancient lights. In this case the Act under which the compensation was claimed provided that "in exercising the power given to the company by the special Act . . . . the company shall make to the owners and occupiers of, and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation . . . for all damage sustained . . . by reason of the exercise of the powers . . . vested in the company."

SHIP—CHARTER PARTY—CONSTRUCTION OF GUARANTEE AS TO SHIP'S CAPACITY.

In *Carnegie* v. *Conner*, 24 Q.B.D., 45, Huddleston and Mathew, JJ., were called on to construe a charter party which provided that the ship should "load a cargo of creosoted sleepers and timbers" and contained the following clauses: "Charterer has option of shipping 100,—200 tons of general cargo;" and "owners guarantee ship to carry at least about 90,000 cubic feet or 1,500 tons dead weight of cargo." They were of opinion that the latter clause did not mean that the ship would be able to carry about 90,000 cubic feet of the description of cargo which the charterer was under the previous clauses entitled to tender, but was merely a warranty of the carrying capacity of the ship.

PRACTICE—NEW TRIAL—EXCESSIVE DAMAGES—LIBEL.

Praed v. *Graham*, 24 Q.B.D., 53, shows how extremely difficult it is to induce the Court to grant a new trial on the ground of excessive damages in an action of tort. In this case the action was for libel contained in a letter to the plaintiff's wife; the Jury gave a verdict for £500. The Divisional Court refused a new trial on the ground of excessive damages, and the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) upheld the decision, considering that it is only when the Court can come to the conclusion that the damages are so excessive that no twelve men could reasonably have given them, they ought not to interfere with the verdict merely on the ground of the damages being excessive.

PRACTICE—APPEAL—STAYING EXECUTION FOR COSTS—DISCRETION OF COURT—RULE 880—(ONT. RULE 804).

The *Attorney General* v. *Emerson*, 24 Q.B.D., 56, the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) denied that there was any practice of the Court that it would always grant a stay of execution for costs pending an appeal, unless the solicitor to receive them would give an undertaking to refund them in case the appeal proved successful, but that the imposition of that term was in the discretion of the Court. In this cause, it being made out to the satisfaction of the Court as to one of the defendants, that there was great danger that the appellant could not recover any costs from him, the Court stayed the execution unless the undertaking was given. Under Ont. Rule, 804, the respon-

dent would appear to be entitled to security for costs, before execution therefor could be stayed.

COMPANY—EXECUTORS REGISTERED AS SHAREHOLDERS—FORGED TRANSFER—NOTICE OF TRANSFER—ESTOPPEL.

Barton v. *London & North Western Railway Co.*, 24 Q.B.D., 77, is a case which shows the responsibility a joint stock company incurs in registering transfers of stock, to see that the transfers on which it assumes to act are genuine. In this case stock was registered in the names of Thomas Barton and Ann Barton as executors of Samuel Barton. Thomas Barton on various occasions executed transfers of shares without the knowledge of Ann Barton, whose name he forged, as well as that of the witness. The transfers were registered. He accounted for the dividends from time to time and so the fraud remained undiscovered. In the case of the last of the forged transfers, notice was sent to Ann Barton that a transfer had been lodged, and unless the company heard to the contrary from her it would be registered. She was persuaded by Thomas Barton that it was all right and took no notice. Sometime afterwards Thomas Barton absconded and the frauds were discovered. The present action was brought by Ann Barton to compel the company to restore her name and Thomas Barton, to the register as being still the owners of the shares, on the ground that the transfers were null and void. For the defendants it was claimed that the executors were not joint owners of the stock, but as executors each had power to dispose of it, and that the transfers executed by one alone were therefore good; and that as to the last of the forged transfers, Ann Barton was estopped from disputing its validity; but the Court of Appeal (Lord Esher, M.R., aud Lindley and Lopes, L.JJ.) were unanimously of opinion that the shares being registered in their joint names, the executors thereby became joint shareholders in their individual capacity notwithstanding they were described in the register as executors, and consequently the shares could only be transferred by a transfer executed by both. As regarded the question of estoppel, the Court thought that there was no estoppel because the plaintiff was claiming a legal right and not merely equitable relief.

TRADE MARK—FALSE TRADE MARK—APPLICATION TO GOODS—INTENT TO DEFRAUD—MERCHANDISE MARKS ACT 1887 (50 & 51 VICT., C. 28, S. 2, S-S. 1). (R.S.C., C. 166, S. 9).

Storey v. *The Chilworth Gunpowder Co.*, 24 Q.B.D., 90, was an information for unlawfully applying a false trade mark to goods contrary to the statute (see R.S.C., c. 166, s. 9). The circumstances of the case were as follows:—The respondents were gunpowder makers, and entered into a contract with the Government to supply powder. Owing to an accident they were unable to make the powder themselves, and in order to carry out their contract they bought German-made powder and put it into barrels supplied by the Government and put labels on the barrels containing their own trade mark. The powder thus delivered was equal in quality to powder of the respondents' own make, but no indication was given that the powder was really German-made. Upon a case stated by magistrates, Lord Coleridge, C.J., and Mathews, J., were of opinion that

the respondents had committed an offence within the Act, and that they had acted with intent to defraud and were liable to be convicted.

MARRIED WOMEN—CONTRACT—MARRIED WOMEN'S PROPERTY ACT 1882 (45 & 46 VICT., C. 75, S. 1, S-S. 3)—(R.S.O., C. 132, S. 3, S-S. 2).

Leak v. *Driffield*, 24 Q.B.D., 98, we have already referred to in our columns, see vol. 25, p. 614. As we there pointed out, it is another of those judicial decisions under the Married Women's Property Act which under pretence of construing it, virtually repeals it or renders it inoperative in an important particular. The action was brought upon a contract made with a married woman to recover the price of goods sold and delivered to her. It appeared that upon her marriage certain property was settled upon her for her separate use, with a restraint upon anticipation, the income of which she spent in the purchase of clothes for herself and children, and that at the date of the contract she had no other separate property free from restraint upon anticipation other than the clothes so purchased. Mathew and Wills, JJ., (the former with reluctance!) came to the conclusion that the foundation of a married woman's liability on her contract is the possession by her at its date of free separate property, with respect to which she might reasonably be deemed to have contracted, and that she could not reasonably be deemed to have contracted with respect to the clothes of herself and children and therefore that she was not liable!

Correspondence.

ATTACHMENT OF DEBTS.

To the Editor of THE CANADA LAW JOURNAL.

Is an assignment of a judgment or chose in action valid as against a primary creditor when attaching summons is served on the garnishee before notice to him of the assignment?

The assignee of the primary debtor relies upon *Grant* v. *McDonnell*, 39 U.C.R. 412, which is apparently the latest case in point and which sustains his contentions—but although decided in 1876 the statutes of 1872 are not referred to in the report of it. On the part of this primary creditor it is submitted that since 35 Vict., cap. 12, consolidated in cap. 122, R.S.O., equitable assignments of choses in action are a thing of the past—and all assignments of choses in action are governed by the statute which expressly requires notice to be given.

Your views upon this question would no doubt be greatly appreciated by others of your subscribers besides,

W. H. B.

London, Jan. 29, 1890.

THE REVISED STATUTES OF ONTARIO.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Were it not that from the earliest moment of our student days we had become accustomed to look at the price of law books with a degree of awe, and calculated how many weeks' salary (did we get any) it would take to purchase those necessary ones which we could not borrow, we would probably consider it a fraud to be compelled to pay for a law text-book from three to five times what it ought to cost. But what I am aggrieved at is that, notwithstanding the great principle which meets us at every turn, that "*Ignorantia legis neminem excusat,*" we have, in order to be able to peruse the Statutes of our land to pay the sum of six dollars. But to whom goes this amount extracted from the not over-filled pocket of the impecunious student, or the barrister or solicitor as yet not overburdened with this world's goods? It cannot surely go to increase the revenues, either directly or indirectly, of a Province boasting of its surplus. It cannot be that the aforesaid Province gets a royalty on the law of the land. Perish the thought! But, then, where does the profit of four dollars go, on books costing about two? We are again reminded of the Roman Emperor who engraved the laws in immense characters on the top of a lofty pillar. The pillar undoubtedly could be seen, so could the laws—if they had had telescopes. Could they complain? Can we?

LAW STUDENT.

IMPRISONMENT FOR DEBT.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—The letter of Mr. Durand in your last number having called my attention to the subject of judgment summonses in Division Courts, it has occurred to me that perhaps a discussion as to the advisability of revising, if not repealing, the enactments referred to might now be opportune. The imprisonment of a debtor, provided for by sec. 240, is in *theory*, as you say, for *fraud, contempt,* etc., and not for *debt.* But it is, I believe, generally understood, and sec. 244 would certainly give countenance to the idea, that "imprisonment for debt" is in reality the term best applicable in the premises. I think I may safely say that in nine cases out of ten, the examination of a judgment debtor under the enactment in question results only in annoyance, irritation, or humiliation of the debtor, and waste of time and money on the part of the creditor, besides a useless occupation of the time and attention of the judge, for which matters of more importance seem never to be lacking.

Apart from all considerations as to whether this method of applying legal "thumb-screws" to indigent debtors smacks of barbarism, would not the well-known uselessness of the proceedings in most cases suggest the advisability of repealing the enactment, and thus freeing our Province (the Banner Province of the Dominion!) from the stigma of "imprisonment for debt" in reality as well as in name?

Would it not be well to obtain from the county judges and the profession generally their views upon this matter, and if in favour of a revision of the law, to submit the same for the consideration of the Government at the present session of the Ontario Legislature?

Picton, 31st of January, 1890. JUSTITIA.

[We gladly publish the above not because we entirely agree with the writer, but because it is the view of one who, from his position and experience, is competent to form a good opinion on the subject. We should be glad to hear from others of our subscribers who are interested in this branch of the law, and have given consideration to its administration.—ED. C.L.J.]

Notes on Exchanges and Legal Scrap Book.

PROFESSIONAL PRIVILEGE.—The Divisional Court, in *Lowden* v. *Blakey and others* (L.R. 23 Q. B. Div. 332), have decided that "the professional privilege," which prohibits a party to an action from requiring the production by his opponent of communications between the latter and his legal advisers, is not to be narrowed down to communications as regards the conduct of litigation or the rights to property. The opinion of the late Master of the Rolls,as expressed in *Wheeler* v. *Le Marchant* (17 Ch. Div. 675), might seem so to narrow it, but the question before the Court of Appeal in that case was, whether correspondence between the defendants' former solicitors and present solicitors, and their former estate agent and present agent, was privileged or not. The order made by the court was: "Order production of the correspondence except such, if any, as the defendants shall state by affidavit to have been prepared confidentially, after the dispute had arisen between the plaintiff and the defendants, and for the purpose of obtaining evidence or legal advice for the purpose of the action." The decision of the same court in *Minet* v. *Morgan* (8 Ch. App. 361) gave a wider meaning to the term professional priviledge, as Lord Selborne and Lord Justice Mellish refused to compel a plaintiff to produce confidential correspondence between himself or his predecessors in title and their respective solicitors with respect to matters in dispute in the action, though made before litigation was contemplated, and Lord Selborne indeed expressed himself surprised to hear the question raised again. Mr. Justice Denman, in *Lowden* v. *Blakey*, expressed his opinion that Sir G. Jessel's definition was not wide enough, and he and Mr. Justice Charles held that *Minet* v. *Morgan* governed the case before them, and would not accede to the defendant's application for the production of a draft advertisement submitted to counsel by the plaintiff. *Wheeler* v. *Le Marchant* can therefore only be understood as showing, that communications between the solicitor and third person must be as regards the conduct of litigation or the rights to property, if they are to be privileged from production: (see the Annual Practice 1888-9, p. 471). It is interesting to observe that Sir G. Jessel, in his judgment in that case, lays down the rule that "Communications made to a priest in the confessional on matters perhaps considered by the penitent to be

more important even than his life or his fortune, are not protected." 'This is, of course, only a dictum, and does not affect the statement made by Mr. Justice Stephen in his digest of the Law of Evidence (4th edit.), p. 184, that "the question whether clergymen, and particularly whether Roman Catholic priests, can be compelled to disclose confessions made to them professionally, has never been solemnly decided in England, though it is stated by the text writers that they can."—*Law Times.*

A KAFIR LAWSUIT.—A Kafir in the witness box is often a surprise to those who know little or nothing of the traditions of the Kafir race. The ease with which the ordinary native parries the most dexterous cross-examination, the skill with which he extricates himself from the consequences of an unfortunate answer, and, above all, the ready and staggering plausibility of his explanations, have often struck those who come in contact with him in the law courts. He is far superior, as a rule, to the ordinary European, in the witness box. Keen witted and ready, he is yet too cautious ever to answer a question the drift of which he does not clearly foresee, and which when he understands he at once proceeds, if necessary, to forestall by his reply. As a result, the truth of his evidence can only be sifted by a very careful proceeding on the part of the cross-examiner, and by keeping him in the dark as much as possible to the bearing of his answers upon the subject matter of the suit. Whether this dialectic skill is innate in the Kafir, or whether it is the result of long cultivation, it is difficult to say; but as some proof of the former, we subjoin a very interesting extract from a book now unhappily becoming rare—viz., Colonel Maclean's "Handbook of Kafir Laws and Customs, compiled from Notes by Mr. Brownlee, Rev. Dugmore and Mr. Ayliff," which will, we venture to think, throw a great deal of light on the present abilities of the descendants of those whose judicial customs fifty years ago are so graphically described in the following words: "When a Kafir has ascertained that he has sufficient grounds to enter an action against another, his first step is to proceed, with a party of his friends or adherents, armed, to the residence of the person against whom his action lies. On their arrival they sit down together in some conspicuous position, and await quietly the result of their presence. As a law party is readily known by the aspect and deportment of its constituents, its appearance at any kraal is the signal for the mustering of all the adult male residents that are forthcoming. These accordingly assemble and also sit down together within conversing distance of their generally unwelcome visitors. The two parties, perhaps, survey each other in silence for some time. 'Tell us the news,' at length exclaims one of the adherents of the defendant, should their patience fail first. Another pause sometimes ensues, during which the party of the plaintiff discuss in an undertone which of their party shall be 'opening counsel.' This decided, the learned gentleman commences a minute statement of the case, the rest of the party confining themselves to occasional suggestions, which he adopts or rejects at pleasure. Sometimes he is allowed to proceed almost uninterrupted to the close of the statement, the friends of the defendant listening with silent attention, and treasuring up in their memories all the points of

importance for a future stage of the proceedings. Generally, however, it receives a thorough sifting from the beginning, every assertion of consequence being made the occasion of a most searching series of cross questions. The case thus fairly opened, which occupies several hours, it probably proceeds no further the first day. The plaintiff and his party are told that the 'men' of the place are from home, that there are none but 'children' present, who are not competent to discuss such important matters. They accordingly retire with the tacit understanding that the case is to be resumed the next day. During the interval the defendant formally makes known to the men of the neighboring kraals that an action has been entered against him, and they are expected to be present on his behalf at the resumption of the case. In the meantime the first day's proceedings having indicated the line of argument adopted by the plaintiff, the plan of defence is arranged accordingly. Information is collected, arguments are suggested, precedents sought for, able debaters called in, and every possible preparation made for the battle of intellects that is to be fought on the following day. The plaintiff's party, usually reinforced both in mental and material strength, arm the next morning, and take up their ground again. The opponents, now mustered in force, confront them, seated on the ground, each man with his arms at his side. The case is resumed by some advocate for the defendant requiring a restatement of the plaintiff's grounds of action. This is commenced by one who was not even present at the previous day's proceedings, but who has been selected for this more difficult stage on account of his debating abilities. Then comes the tug of war; the ground is disputed inch by inch; every assertion is contested, every proof attempted to be invalidated, objection meets objection, and question is opposed by counter-question, each disputant endeavoring with surprising adroitness to throw the burden of answering on his opponent. The Socratic method of debate appears in all its perfection, both parties being equally versed in it. The rival advocates warm as they proceed, sharpening each other's ardour, till from the passions that seem enlisted in the contest a stranger might suppose the interests of the nation were at stake and dependent upon the decision. When these combatants have spent their strength, or one or other of them is overcome in argument, others step to the rescue. The battle is fought over again and on different ground, some point either of law or evidence that had been purposely kept in abeyance being now brought forward, and perhaps the entire aspect of the case changed. The whole of the second day is frequently taken up with this intellectual gladiatorship, and it closes without any other result than an exhibition of the relative strength of the opposing parties. The plaintiff's company retire again, and the defendant and his friends review their own position. Should they feel that they have been worsted, and that the case is one that can not be successfully defended, they prepare to attempt to bring the matter to a conclusion by an offer of the smallest satisfaction that the law allows. This is usually refused, in expectation of an advance in the offer, which takes place generally in proportion to the defendant's anxiety to prevent an appeal to the chief. Should the plaintiff at length accede to the proposed terms they are fulfilled, and the case is ended by a formal declaration of acquiesence."—*The Cape Law Journal.*

CONTINUING GUARANTEES UNDER SEAL.—The popular notion of a guarantee is unquestionably that it is a contract revocable, whether under hand or seal, as to the future at the will of the guarantor. In contrast to this is the view which seems at one time to have prevailed that *in no circumstances* could a guarantee under seal be revoked. In *Calvert* v. *Gordon*, 3 Man. and Ry. 124, we have a decision which appears to support that view. In that case action was brought against the executrix of a testator who had given a bond conditioned for the faithful service of one Richard Edwards as a collecting clerk to the obligees, trading as Felix Calvert and Co., from time to time and at all times during his continuance in their service and employ. Edwards remained in the service of the plaintiffs and their co-partners as such collecting clerk, was in such service on the day of the death of the testator, and so continued from thenceforth until and after a certain notice was given. This notice was a notice in writing to plaintiff, given by defendant as executrix, to the effect that she would not, as such executrix, remain surety to, or guarantee or indemnify the plaintiffs, for the fidelity of or to and faithful performance by Edwards of his duty as such collecting clerk. Edwards failed to pay over certain moneys that he had collected,and the question was whether the defendant was liable under the bond to indemnify the plaintiffs to the extent of the loss sustained by such non-payment. In respect of moneys received by Edwards before the giving the notice of discontinuance of the guarantee, the loss amounted to £17 2s.; in respect of moneys received subsequently to such notice, the loss was £1,744 1s. 8d. It was in respect of this last-mentioned sum that the real question at issue arose. On behalf of the executrix it was urged that from the nature of the transaction the obligor or his personal representative must be at liberty to discontinue the guarantee, and that a contrary decision would bind the surety to answer for the conduct of the clerk during the joint lives of the master and clerk, provided they continued in that relation to one another, notwithstanding any change of circumstances or conduct on the part of the clerk; but Lord Tenterden, C.J., held that the obligor in such a case must remain liable at all events during the whole period of the service. It would, he said, be a hardship upon the master if the surety could put an end to his liability by giving a notice *which is to take effect from the very day on which it is given.* In reply to the argument of hardship to the surety, his lordship thought it was the intention of the testator to enter into this unlimited engagment, and that he might have stipulated that he should be discharged from all future liability after a specified time, after notice given. In *Burgess* v. *Eve*, L.R. 13 Eq. 450, the question was again raised. There a father, being desirous of obtaining advances for his son from a bank, gave the son a promissory note for £2,000, and entered into an agreement under seal with the bank to the effect that, in consideration of the bank discounting the note for £2,000 for his son, certain deeds and documents which the father deposited with the bank should remain with the bank as security for the payment of all money due or to become due from the son to the bank, on any account whatsoever, and that he would pay the bank upon demand all such money, and he thereby charged the property comprised in such documents with

the repayment thereof. The father died, and the son having become bankrupt, a claim was made by the bank against the estate of the father. This claim had been disallowed by the chief clerk, so far as it rested on the guarantee, on the ground, mainly, that the guarantee being under seal was irrevocable, and that, being irrevocable, the guarantor could not have intended that it should extend to any further sum than £2,000. Malins, V.C., on the question coming before him in Chambers, adjourned it into Court for argument, and decided that the agreement was not limited to the £2,000, but was a continuing guarantee for all money already due, or which should become due, from the son to the bank; and he laid down that a general guarantee under seal might in certain circumstances be withdrawn upon the terms of paying all that may be due under it at the time of giving notice of withdrawal. "Authorities," said the V.C., "have been cited to show that a guarantee under seal is irrevocable. I do not accede to that view of the law. Certain guarantees are undoubtedly irrevocable. When a guarantee is of the fidelity or good conduct of a servant or clerk or person in a confidential position, it may be considered as a contract by the employer and employed, and the surety on his behalf. Therefore if a father guarantee the fidelity of his son, and upon the faith of that guarantee the son obtains a situation, there being no misconduct on the part of the son, reason requires that the father should not arbitrarily have the power of depriving his son, or any person whose credit he guarantees, of the appointment which he has obtained on the faith of the guarantee. If arbitrarily and without the fullest justification he desires to withdraw that which he has deliberately entered into, I am of opinion under such circumstances as those that he would have no right to withdraw . . . but notwithstanding all that has been said, I am clearly of opinion that a person who has entered into such a guarantee, and who is, therefore, responsible for the person whose fidelity is guaranteed, has a right to withdraw from that guarantee when that person has been proved guilty of dishonesty." We do not propose to deal with the question—a wider one—of continuing guarantees in general, their revocability and the distinctions, which may be found in *Harris* v. *Fawcett*, L.R. 8 Ch. App. 866, *Coulthart* v. *Clemenston*, 5 Q.B.D. 42, *Phillips* v. *Foxall*, L.R. 7 Q.B. 666, and *Lloyds* v. *Harper*, L.R. 16 Ch. D. 290; but restricting the inquiry to the case of continuing guarantees under seal, it is, we think, clear that the guarantee is now to be subjected to the same rules of construction as if under hand; the nature of the guarantee is to be the determining factor. If the matter were *res integra* it would, we think, be difficult to defend the reasoning of Lord Tenterden in *Calvert* v. *Gordon* (*ubi sup.*): where is the hardship to the employer if it is open to the guarantor to determine his guarantee, not from the date of the notice, but from a reasonable time after the date? The employed could determine his employment on notice in the usual way, and if he did so the employer would not complain of hardship. Why should not the guarantor—subject to any contract between himself and the employed—have a similar right with regard to that which depends on the employment, the guarantee?—*Pump Court.*

DIARY FOR FEBRUARY.

1. Sat.....Sir Edward Coke born 1552.
2. Sun....*Septuagesmia.*
3. Mon....County Court Non-Jury Sittings in York. Hilary Term commences. High Court of Justice Sittings begin.
5. Wed....W. H. Draper, 2nd C.J. of C.P., 1856.
9. Sun....*Sexagesima.* Union of U. and L. Canada, 1841.
10. Mon....Queen Victoria married 1840. Canada ceded to Great Britain, 1763.
11. Tues....T. Robertson appointed to Chy.Div., 1887.
15. Sat..... Hilary Term and High Court of Justice Sittings end.
16. Sun....*Quinquagesima.*
18. Tues....supreme Court of Canada sits.
17. Wed....Ash Wednesday.
23. Thu.....Chancery Division High Court of Justice sits.
23. Sun....*First Sunday in Lent.*
24. Mon....St. Matthias.
28. Fri.....Indian Mutiny began 1857.

Reports.

FIRST DIVISION COURT OF THE COUNTY OF ONTARIO.

WEBSTER *v.* MCDOUGALL.

Division Court Act, secs. 88, 89, 290.

In an action against a bailiff for a false return, sections 88 and 89 are not applicable, but section 290 is: and the effect of that section is that no such action can be brought except in the county where the bailiff resides and only in the County or High Court.

[WHITBY, Nov. 28, 1889.

The following facts were admitted:

1. The defendant is the Bailiff of the First Division Court of the United Counties of Northumberland and Durham, and this action is brought against him in said capacity.

2. The defendant in the early part of 1888 had an execution in his hands in a suit of Webster (the plaintiff herein) against one Pearce, and under said execution seized a colt, and subsequently seized some cattle; a claim was made to the cattle, an issue was directed, and on the trial the goods were found to be liable to the execution, and against the claimant. That the Bailiff (defendant herein) sold the goods so seized (excepting the colt) and paid the proceeds into Court, and returned the execution also as satisfied in part, and *nulla bona* as to balance.

3. The said return was made more than six months prior to this action being brought.

4. The Bailiff (defendant) herein has received no notice of action.

5. The Bailiff (defendant) resides in the town of Bowmanville which is five miles from the village of Newcastle, where the sittings of Second Division Court of the United Counties of Northumberland and Durham are held; and the town of Whitby, the place where the sittings of this Court are held is distant thirteen miles from Bowmanville.

6. The parties hereto have agreed that the Judge of this Court may decide on these admissions.

DARTNELL, J. J.—Section 88 of the Division Court Act is clearly not applicable, because it only applies to a case where there is a *debt due to or by* a Clerk or Bailiff. The action, therefore, could not be brought in the Newcastle Division Court because it is not brought for a debt but for a malfeasance in office.

Section 89, to my mind concerns actions of a like nature as an action *against* a Clerk or Bailiff, and is controlled by section 290. As practically this action is for a false return, it appears to me that the latter section applies.

It is "a thing done in pursuance of the Act" which provides "that the action shall be commenced within six months after the fact was committed, and shall be "laid and tried in the County where the fact was committed and notice given," etc., sec 290 (d).

These words appear to me to oust the jurisdiction of *any* Division Court to try this action, and that the plaintiff's remedy is in the County Court of the County in which the fact was committed; or in the High Court with the venue laid in that County, according to the damages claimed.

I hold I have no jurisdiction to adjudicate, and I dismiss the action with costs on that ground only. There will be no necessity to express any opinion upon the facts or on the other questions raised.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

ONTARIO AND QUEBEC RAILWAY CO. *v.* MARCHETERRE.

Application to give security for costs—Supreme and Exchequer Courts Act, s. 46—Appeal—Jurisdiction—Interlocutory judgment—Final judgment—Art. 1116, C.C.P.—Amount in controversy not determined—Supreme and Exchequer Courts Act, ss. 28 and 29.

STRONG, J. (in Chambers), dubitante as to the jurisdiction of the Supreme Court to hear an

appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), and desiring to give the parties an opportunity of having the question of jurisdiction decided by the full court, granted an application to allow the payment of $500 into court as security for the costs of the appeal, as the time for appealing from the said judgment would elapse before the next sittings of the Court.

On a motion to quash for want of jurisdiction before the full court, it was

Held, 1. That a judgment of the Court of Queen's Bench for Lower Canada (appeal side), quashing a writ of appeal on the ground that the writ of appeal had been issued contrary to the provisions of the Art. 1116, C.C.P., is not "a final judgment" within the meaning of s. 28 of the Supreme and Exchequer Courts Act. (*Shaw* v. *St. Louis*, 8 Can. S.C.R., 387, distinguished.)

2. Per RITCHIE, C.J., and STRONG, TASCHEREAU, and PATTERSON, JJ., that the Court has no jurisdiction where the amount in controversy upon an appeal by the defendant has not been established by the judgment appealed from. Supreme and Exchequer Courts Act, s. 29.

Appeal quashed with costs.

F. X. Archambault, Q.C., for respondent.

H. Abbott, Q.C., contra.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

Q.B.D.] [Jan. 14.

MAGEE *v.* GILMOUR.

Landlord and tenant—Expiration of term—Notice to quit—Sub-lease—Overholding tenant.

This was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 17 O.R., 620, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 26th and 27th of November, 1889.

The Court, agreeing with the judgment below, dismissed the appeal with costs, holding that the tenancy, though by oral lease void under the Statute of Frauds, was a tenancy for a term certain, and not from year to year; that the sub-tenancy came to an end with the tenancy, and that the subsequent circumstances, fully set out in the judgment below, did not operate to create a new term as between the sub-tenants and the plaintiff.

McCarthy, Q.C., and *W. H. Barry* for the appellants.

J. H. Macdonald, Q.C., for the respondent.

Q.B.D.] ANDERSON *v.* FISH.

Sale of goods—Stoppage in transitu—Consignor and consignee—Right of carriers to prolong period of transitus.

This was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 16 O.R., 476, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 14th of November, 1889.

The Court dismissed the appeal with costs, agreeing with and adopting the reasons for judgment of the majority in the Court below.

G. T. Blackstock for the plaintiff.

J. B. Clarke for the defendant.

Q.B.D.]

MANDIA *v.* MCMAHON.

Contract—Breach—Measure of Damages.

The defendant, who was a contractor for certain work at Lancaster, Ont., entered into an agreement with the plaintiffs that if they would go to New York and procure about 200 labourers, he would give them work at $1.25 a day.

The plaintiffs were allowed as damages for the breach of this agreement, $25, their expenses in going to and returning from New York, and $700, the amount of advances made by them to certain of the labourers to pay their fares from New York. They were not allowed commission that would have been received by them from the men if employment had been furnished.

Judgment of the Q.B.D. affirmed.

McCarthy, Q.C., and *Aylesworth* for the appellant.

H. Symons for the respondents.

Co. Ct. Hastings.]

JOHNSON *v.* HOPE.

Assignments and preferences—Bankruptcy and insolvency—Bills of sale and chattel mort-

gages — Mortgage to secure moneys paid by mortgagee to creditor—Intent to prefer—Notice of Insolvency—R.S.O., c. 124, s. 2.

A transaction entered into by a person in insolvent circumstances is not impeachable unless the person claiming the benefit of the transaction had notice or knowledge of the insolvency and did not act in good faith.

A security given by a person in insolvent circumstances to secure an actual advance made without notice or knowledge of the insolvency and in good faith is not impeachable because the moneys advanced are, pursuant to the direction of the insolvent, paid over to one of his creditors, who thereby obtains a preference.

Stoddart v. *Wilson*, 16 O.R., 17, discussed.

Judgment of the County Court of Hastings reversed.

Moss, Q.C., and *F. E. O'Flynn* for the appellant.

R. C. Clute for the respondent.

Q.B.D.]

ROSS *v.* CROSS.

Negligence — Master and servant — Accident caused by defect in hoist.

The defendant was the owner of a tannery for whom a hoist had been built by a contractor, and was, with the plaintiff, one of his employees, aiding the contractor in putting the hoist in place and in testing it. Owing to a defect in the mechanism, of which the plaintiff and defendant were ignorant, the hoist fell, and the plaintiff was severely injured. Both parties were aware that no safety catches had been put in the hoist. The presence of these might have stopped the fall, but their absence had nothing to do with the occurrence of the accident.

Held, that the defendant was not liable.

Judgment of the Queen's Bench Division directing a new trial set aside, and judgment of FALCONBRIDGE, J., at the trial restored.

McCarthy, Q.C., and *Pepler* for the appellant.

Lount, Q.C., for the respondent.

Chy.D.]

GIBBONS *v.* WILSON.

Assignments and preferences—Bills of sale and chattel mortgages—Actual advance—R.S.O., c. 124, ss. 2 and 3.

A solicitor, acting for a creditor, obtained for the debt, on the security of a chattel mortgage, a loan from another client who was ignorant of the purpose for which the loan was required. The solicitor, out of the moneys advanced, paid off the creditor in full, and shortly afterwards the debtor assigned.

Held, affirming the judgment of the Chancery Division, 17 O.R., 290, that the mortgage was one to secure a present actual *bona fide* advance, and could not be impeached.

Moss, Q.C., and *Garrow*, Q.C., for the appellant.

W. F. Walker for the respondent.

ARMOUR, J.]

JOHNSTON *v.* TOWNSHIP OF NELSON.

Municipal Corporations — Highways—Bridges —Limitation of action—R.S.O., c. 184, ss. 530 and 531.

An action to recover damages sustained by reason of the neglect of a municipal corporation to keep in repair the approaches to a bridge, where the bridge and approaches are under the jurisdiction of one municipality only, must be brought within three months after the damages have been sustained.

Section 530 of R.S.O., c. 184, applies only to cases where one municipality has jurisdiction over a bridge and another has jurisdiction over the adjacent approaches.

Judgment of ARMOUR, C.J., affirmed.

Carscallen for the appellant.

Fullerton and *J. W. Elliott* for the respondents.

ROSE, J.]

IN RE CROFT AND THE TOWN OF PETERBOROUGH.

Municipal corporations— By-law—Liquor License Act. R.S.O., c. 194, s. 42—Electors.

The electors entitled to vote upon by-laws under R.S.O., c. 194, s. 42, are those entitled to vote at municipal elections.

Judgment of ROSE, J., 17 O.R., 522, affirmed on other grounds.

Robinson, Q.C., and *E. B. Edwards* for the appellants.

Proussette, Q.C., and *Aylesworth* for the respondent.

PROUDFOOT, J.]

SWIFT *v.* THE PROVINCIAL PROVIDENT INSTITUTION.

Insurance—Benevolent Society—R.S.O., c. 136 R.S.O. c. 172.

The "Act to secure to Wives and Children the Benefit of Life Insurance," R.S.O., c. 136, applies to insurances in Societies incorporated under the Benevolent Societies Act, R.S.O., c. 172.

In re O'Hern, 11 P.R., 422, overruled.

Judgment of PROUDFOOT, J., reversed, BURTON, J.A., dissenting.

G. M. Rae for the appellant.

J. S. Robertson for the respondent.

Q.B.D.]

HANDS *v.* THE LAW SOCIETY OF UPPER CANADA.

Barrister and Solicitor—Law Society—Disciplinary jurisdiction — Evidence — Notices—R.S.O., c. 145.

In exercising their disciplinary jurisdiction, the Benchers of the Law Society, if they take evidence at all, must take it upon oath, unless the right to have the evidence taken upon oath is waived.

Where the plaintiff attended before the Discipline Committee and, without objection, allowed witnesses to make unsworn statements, and examined them upon them, and made an unsworn statement himself, it was held that he could not, after the investigation was ended, take exception to the regularity of the proceedings on the ground that no oath was administered.

Nor could he take exception to the regularity of the proceedings after the investigation was ended, because the notice to the members of the Discipline Committee of the meeting to consider his case did not specify the nature of the business to be disposed of, nor because no notice of the meeting was sent to the Treasurer of the Society, *ex officio* a member of the Discipline Committee, he being at the time in Europe.

Judgment of the Queen's Bench Division, 17 O.R., 300, reversed, and that of BOYD, C., 16 O.R., 625, restored.

A. H. Marsh and *W. Read* for the appellants.

C. J. Holman for the respondent.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Full Court.] [Dec. 21st, 1889.

REGINA *v.* MCMAHON.

Criminal law—Indictment for murder—Evidence, admissibility of—Statements of deceased after being shot—Complaint—Cross-Examination of Crown witness—Particulars of complaint—Res gestae—Dying declaration.

At the trial of the defendant upon an indictment for the murder of one H., a witness for the Crown swore upon direct examination that H. lived about thirty rods from him, and that one night about half an hour after he had heard shots in the direction of H.'s house, H. came to the witness' house and asked the witness to take him in, for he was shot. The witness did so, and H. died there some hours afterwards.

Evidence of statements made by H. after being taken into the witness' house was rejected.

Upon a case reserved it was contended on behalf of the defendant (1) That counsel for the defendant was entitled to ask the witness in cross-examination whether H. mentioned any particular person as the person who attacked him ; (2) That statements made by H. after he arrived at the witness' house were admissible as part of the *res gestae* ; (3) That such statements, or some of them, were admissible as dying declarations.

Held, 1. That the admission of evidence of a complaint having been made ought properly to be confined to rape and its allied offences, but even if such evidence is admissible in other cases, it can only be so where the person making the complaint has been examined as a witness ; and moreover in this case, when H. asked the witness to take him in for he was shot, he was not making a complaint at all, but merely assigning a reason for asking to be taken in, and the question proposed to be asked was not relevant.

2. That the statements made by H. after he was taken into the house were not admissible as part of the *res gestae*, being made after all action on the part of the wrongdoer had ceased through the completion of the principal act, and after all pursuit or danger had ceased.

Regina v. *Bedingfield*, 14 Cox 341, and *Regina* v. *Goddard*, 15 Cox, 7, followed.

3. That upon the evidence the statements made by H. after being taken into the house were not made under a settled hopeless expectation of death, and were, therefore, not admissible in evidence as a dying declaration.

J. R. Cartwright, for the Crown.

W. R. Meredith, Q.C., and *Pegley*, for the defendant.

Div'l Court.] [Dec. 21, 1889.

WALKER *v.* BOUGHNER.

Specific performance—Contract to make provision by will for granddaughter—Action against executors—Uncertainty of promise and consideration—Services rendered to testator—Remuneration for.

Where a contract on the part of a testator, founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligations.

But where the testator, the grandfather of the plaintiff, took her from the home of her parents at the age of twelve, adopted her, and maintained her, while she worked for him, for nine years, but left her nothing by his will, and paid her nothing for her services, and she sued his executor for specific performance of an alleged contract or promise to make the same provision for her by his will as he should make for his own daughters, and in the alternative for wages;

Held, upon the evidence, that the case did not fall within the rule; the promise alleged to have been made, and the consideration for it, being both of too uncertain a character to entitle the plaintiff to come to the Court for a performance of the promise: but that the circumstances gave rise to an implied contract for the payment of wages, and took the case out of the ordinary rule that children are not to look for wages from their parents, or those in *loco parentis*, in the absence of special contract, whilst they form part of the household.

Decision of PROUDFOOT, J., varied.

Lash, Q.C., for the plaintiff.

Moss, Q.C., for the defendants.

Div'l Court.] [Dec. 21, 1889.

HUBERT *v.* TOWNSHIP OF YARMOUTH.

Municipal corporations — Action to compel maintenance of road—Assumption of road by corporation—Statute labour done with consent of municipal officers—Remedy by indictment.

In an action to compel a municipal corporation to maintain and repair a street laid out by private persons, it appeared that such street was not established as a highway by by-law nor assumed for public use by any corporate act of the municipal corporation; but it was contended that the performance of statute labour thereon with the consent of the pathmaster, and on one occasion with the consent of the councillor for the ward and of the reeve, was evidence that it was otherwise assumed for public use.

Held, that the acts required to work such an assumption must be corporate acts, clear and such as clearly and unequivocally indicate the intention of the corporation to assume the road; and the acts relied upon in this case could not bind the corporation nor work such an assumption.

Held, also, following *Hislop* v. *McGillivray*, 15 A.R. 687, that even if the street had been assumed for public use, the plaintiff's only remedy was by indictment, and the action was not maintainable.

G. T. Blackstock, for plaintiffs.

Glenn, for defendants.

Practice.

MACMAHON, J.] [Jan. 6.

MACDONELL *v.* BAIRD.

Costs—Judgment by consent referring to arbitration—Omission to provide for costs—Powers of arbitrator—Rule 550—Amendment of judgment.

In an action on a bill of costs the parties consented that judgment should be entered for a certain sum "subject to the award" of a named person. When the action came on for trial this consent was filed, and the trial Judge indorsed the record, "I order that judgment be entered for the plaintiff for the sum of, etc., subject to the consent filed herein." Nothing was said about costs, and they were not provided for in

any way. The arbitrator or referee made his report or award finding that the amount of the judgment should be reduced to a named sum, and adding, "I do award to the plaintiff the costs of this action, including the costs of the reference and award." Judgment was entered in accordance with this award.

Rule 550 provides that "The Court will not refer to arbitration."

Held, that this Rule does not prevent any arrangement for the settlement of an action entered into and acted upon by litigants from being sanctioned and enforced by the Court; and therefore there was power to make a reference by consent in this way; but it was a reference to arbitration and not a reference under the Judicature Act, and the referee had no power to deal with the costs.

The award of costs was stricken out of the judgment, and an application afterwards made to the trial Judge to amend the indorsement on the record so as to provide for the costs was refused, although the omission to provide for the costs was not intentional.

Masten for the plaintiff.

W. H. Blake for defendant.

ARMOUR, C. J.] [Jan. 10.

MELBOURNE *v.* CITY OF TORONTO.

Costs—Defendants severing—Partnership—Dissolution before action.

In an action against a municipal corporation for injury to a drain, the corporation caused the two contractors who had constructed the drain and the assignee of one of them to be made defendants. The two contractors were partners at the time of the construction of the drain but had dissolved partnership before the action was begun One partner appeared and defended by one solicitor and the other and his assignee by another solicitor. Judgment was given dismissing the claim of the corporation against the added defendants with costs, but they were not by the judgment limited to one set of costs.

Held, that there was no "law of the Court" which under the circumstances of this case justified the taxing officer in refusing to allow more han one set of costs to the added defendants.

Rule 1202 considered.

C. R. W. Biggar for the City of Toronto.

C. Millar for added defendants.

ROSE, J.] [Jan. 27.

MILLIGAN *v.* SILLS.

Venue—Change of—Preponderance of convenience—County Court action—Appeal from Master in Chambers—Rule 1260.

Upon motion to change the venue from Toronto to Napanee in a County Court action, brought to recover $100 damages for breach of a contract by the defendant to sell a horse to the plaintiff, it appeared that the defendant resided in the County of Lennox and Addington and the plaintiff in Toronto and all the witnesses on both sides were in Lennox and Addington except the plaintiff himself and one other in Toronto.

The defendant swore that he required eleven witnesses at the trial. It was not clear where the cause of action arose, but the breach was probably where the defendant resided.

Held, that there was a very great preponderance of convenience in favor of having the action tried at Napanee, and the venue was accordingly changed.

Held, also, that an appeal lay to a Judge in Chambers from an order of the Master in Chambers under Rule 1260.

Hilton for plaintiff.

Aylesworth for defendant.

ROBERTSON, J.] [Jan. 28.

In re GIBSON.

Bond—Solicitors for committee of lunatic as sureties.

The rule that the solicitor for a party will not be accepted by the court as a bondsman for such party is still in force.

The rule was applied to the case of the committee of the person and estate of a lunatic giving a bond for the due performance of her duties as such committee and offering her two solicitors as sureties.

E. T. Malone for Inspector of Prisons and Public Charities.

Hoyles for Committee.

MACMAHON, J.] [Jan. 30.

KNIGHT *v.* GRAND TRUNK RY. CO.

Discovery—Examination of officers of railway company.

Held, that a track foreman, a switch-foreman and two engine-drivers in the employment o

the defendant company were not officers of the company examinable for discovery under Rule 487, in an action for damages arising out of a railway accident.

Walter Read for plaintiff.

Douglas Armour for defendants.

Court of Appeal.] [Jan. 14.

LEITCH *v.* GRAND TRUNK RY. CO.

Discovery--Examination of officer of railway company—R.S.O., 1877, c. 50, s. 156, (Rule 487) —Railway conductor—Reading depositions at trial.

An appeal from the decision of the Queen's Bench Divisional Court, 12 P.R. 671, that the plaintiff had the right to examine for discovery, as an officer of the defendants the conductor of a train of the defendants through whose alleged misconduct the plaintiff was injured, was dismissed by reason of the disagreement of the Judges in this Court.

Held, per HAGARTY, C.J.O., and BURTON, J.A., that the conductor was not examinable as an officer under R.S.O., 1877, c. 50, s. 156 (Rule 487); and per OSLER and MACLENNAN, JJ.A., that he was examinable.

Per BURTON, J.A.—The only officers intended by s. 156, were such officers as might under the former system have been properly made defendants for discovery merely. The examination sought was not really for discovery; it was a fishing inquiry to ascertain before the trial what precise evidence a particular witness would give.

Per OSLER, J.A.—The test of the propriety of allowing an officer or servant of a corporation to be examined for discovery is his ability to give the necessary information. A person who is entrusted with the charge of a railway train in the course of its transit, the conductor of the train, is, as to that particular occasion, and for that particular purpose, to be regarded as an officer of the corporation as distinguished from a mere servant, no matter how temporary his employment or how summary the corporation's power of dismissal.

Moxley v. *Canada Atlantic Railway Co.*, 15 S.C.R., 145, discussed.

Semble, *per* OSLER, J.A., that the depositions of an officer of a company upon examination for discovery can only be read against the company at the trial, if at all, when they have taken part in the examination.

Aylesworth for appellants.

W. R. Meredith, Q.C., for respondent.

ROBERTSON, J.] [Feb. 3.

MONK *v.* BENJAMIN.

Parties—Mortgage action for foreclosure—Wife of assignee of mortgagor—Costs—Appeal from taxation—Amount involved.

The wife of a person to whom the mortgagor conveys his equity of redemption is not a proper party to an action by the mortgagee for foreclosure.

Semble, if such person died after judgment, but before final order of foreclosure, his widow would have a right to redeem and might be made a party. An appeal from taxation of costs was entertained in Chambers where the amount involved was only $5.32, for the reason that a question of principle was raised.

J. C. Hamilton, for plaintiff

R. A. Dickson, for defendants.

FERGUSON, J.] [Feb. 10.

LEACH *v.* GRAND TRUNK RY. CO.

Discovery—Examination of officer of railway company—Engine driver.

Held, following *Knight* v. *Grand Trunk Ry. Co.*, *ante* p. 90, that a servant of the defendant company who was driving a detached engine of the company when it knocked down and killed the man for whose death the action was brought, was not an officer of the company examinable for discovery under Rule 487.

J. W. McCullough, for the plaintiff.

Aylesworth, for the defendants.

Law Students' Department.

EXAMINATION BEFORE HILARY TERM: 1890.

FIRST INTERMEDIATE.

Anson on Contracts—Statutes.

Examiner—R. E. KINGSFORD.

1. What are the requirements in an *offer* and an *acceptance*, respectively, as elements of contract?

2. Where skilled labour has to be expended upon a thing sold before the contract is executed and the property transferred, in what case does the contract come within the Statute of Frauds?

3. In what respect do the rights to rescind a contract obtained by undue influence differ from those of rescission where the contract has been obtained by fraud?

4. What exceptions to the general rule that the written record of a contract must not be varied or added to by verbal evidence of what was the intention of the parties?

5. What are the characteristics of *negotiability* in instruments? Illustrate by example.

6. What is the difference between *substituted contracts* and *waiver?*

7. What is a *protest* of a bill or note? What is *notice of dishonor?*

Smith's Common Law.

Examiner—R. E. KINGSFORD.

1. In what cases may an *assault and battery* be justified?

2. In what cases can a private individual justifiably cause the arrest of another person without a warrant?

3. In an action for malicious prosecution or malicious arrest, what must the plaintiff prove?

4. What are the requisites in an agreement for the sale of goods for the price of $40.00? Why?

5. What is the remedy in case of breach of warranty (1) on an executory contract; (2) where there has been an absolute sale of an article *in esse* with a warranty?

6. What is the difference in result where a particular agent exceeds his authority, from that where a general agent exceeds his authority?

7. Mention the modes of redress of private injuries *by the mere act of the parties.*

Equity.

Examiner—P. H. DRAYTON.

1. Define constructive fraud, and give an example.

2. What distinction (if any) is there between trustees and executors, in regard to the effect of their joining in receipts?

3. What is meant by the maxim Equity imputes intention to fulfil an obligation? Illustrate.

4. Define mistake as remediable in Equity. What mistake of law is considered as equivalent to a mistake of fact, and why?

5. Into what different classes are accounts divided?

6. A. makes a mortgage to B. for $1,000, with interest at the rate of 6 per cent. The mortgage contains a proviso that if interest be not regularly paid, the mortgagor shall pay 7 per cent. Is such a proviso good? if not, why not?

7 What is meant by the term "election" as used in Equity?

Real Property.

Examiner—P. H. DRAYTON.

1. Distinguish between a reversion and a remainder?

2. State the reasons which led to the passing of the Statute of Uses, and state how, if in any way, the provisions of the statute were avoided?

3. Give an example of a tenant in tail after possibility of issue extinct.

4. What is meant by an estate in land?

5. What is an "*interesse termini*"?

6. Distinguish between a joint tenancy and a tenancy in commom.

7. What is the provision of the Statute of Frauds with regard to leases for a fixed number of years?

SECOND INTERMEDIATE.

Personal Property and Judicature Act.

Examiner—R. E. KINGSFORD.

1. Define a *Warranty*, and distinguish Breach of Warranty from Fraud.

2. Why are Trustees of Personal Estate property constituted joint owners?

3. Name and define the kinds of chattels which descend to the *heir?*

4. How far is the rule against perpetuities applied as respects interests in personal estate? Why?

5. In an action for partnership account, what steps can the plaintiff take to obtain the account and how soon can he take them?

6. In what case, the defendant being in default, of pleading can the plaintiff enter final and interlocutory judgment simultaneously?

7. On an assignment of a chose in action, what effect has notice in writing to the original debtor of the fact of such assignment ?

Broom's Common Law.

Examiner—R. E. KINGSFORD.

1. In what cases will an action of slander lie without proof of *special damage ?*

2. What is the law as to criminal liability of a married woman ?

3. Explain how *false representation* will be a ground for an action of damages.

4. Distinguish *absolute privilege* from *qualified privilege* as affecting communications.

5. Explain the difference as regards criminal liability between an *intention* to commit a crime and attempt to do so.

6. Explain the different kinds of estoppel.

7. By what authority, and in what time may Acts of the Dominion and Provincial Legislatures respectively, be disallowed ?

Equity.

Examiner—P. H. DRAYTON.

1. Under what circumstances is extrinsic evidence admissible in the case of double legacies, either in favor of or against the presumption of satisfaction ?

2. A. enters into a binding contract with B. for the purchase of Blackacre ; he refuses to carry out the contract. B. brings an action for specific performance of the contract. A. defends the same alleging, as a defence, misrepresentation. What must he prove under such a defence in order to succeed ?

3. A. becomes surety to B. for the payment by C. (who is at the time perfectly solvent) of $1,000. B. has taken a chattel mortgage from C. to secure $500 of the debt, but neglects to register the same. C. becomes insolvent, and the chattel martgage for want of registration is void as against the other creditors. B. calls upon A. to pay the $1,000. Should he succeed, and if not, why not ?

4. State the law with regard to the appropriation of payments between debtor and creditor.

5. A. and B. are about to intermarry ; marriage articles are drawn up, and after marriage a settlement is made which does not in its terms purport to be made in pursuance of the prenuptial articles, and settlement is found not to conform with the articles, and B., the wife, seeks to have it rectified. Can she succeed ? State the general law.

6. Under what circumstances (according to Snell) will a Court of Equity in general set aside and cancel agreements and securities which are voidable merely and not void ?

7. Under what circumstances (if any) can a trustee safely delegate his authority to another?

Real Property.

Examiner—P. H. DRAYTON.

1. Is it necessary that there should be a consideration in a deed by way of bargain and sale ? If so, why ?

2. When do covenants run with the land, and when not?

3. What time has a mortgagee within which to sue on the covenant in his mortgage, and how long within which to recover the land after default ?

4. What is meant by a "protector of the settlement" ?

5. What was the reason that no freehold estate could be created by deed to take effect "*in futuro*" ? By what method (if any) could it be done ?

6. What are the formalities required to be observed in the execution of a will ?

7. What is the effect of a statutory discharge of mortgage *(a)* before, *(b)* after registration?

Law Society of Upper Canada.

TRINITY TERM, 1889.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in

regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School, Osgoode Hall, Toronto.

Those Students-at-Law and Articled Clerks, who under the Rules are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be the most necessary for the guidance of the Student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.
Lecturers, E. D. ARMOUR. A. H. MARSH, LL.B.
Examiners R. E. KINGSFORD, LL.B. P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1860, fourteen Scholarships in all will be offered for competition, seven for those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students.

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School:

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hiliary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum:

CURRICULUM.

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.

Hawkins on Wills.

Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.

Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.

Pmith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.

Smith's Mercantile Law.

Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively. On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

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THE Report which we publish in this number of the case of *Miller* v. *Nash*, decided by the Court of Appeal in England last year, but not hitherto reported there, will be of interest to those of our readers who have the unpleasant duty of conducting a solicitor and client action. Some of the points raised are similar to those which were recently disposed of by our own Court of Appeal in *Thompson* v. *Robinson* (16 A.R., 175), while others appear to carry the law against solicitors' negligence beyond any case with which we are familiar. The report was prepared from certified copies of the pleadings, evidence, and judgments obtained from England.

IT is related of a well-known legal practitioner of this Province, who some years ago vanished from the scene, that, years ago (when arrest for debt was the law), he was employed by a client who resided in the United States to manage his estates in Canada. In the course of his management he received some considerable sums of money, which he neglected to account for. The client died, and after his death his widow paid a visit to this Province, for the purpose of obtaining an account from the defaulter. The account was duly rendered, and showed a considerable balance in the lady's favour, which the attorney declared himself unable to pay. She inquired anxiously from him what was to be done. "Well, madam," said he, "according to the law of this Province, when a debtor is unable to pay his debt, the creditor is entitled to take his body, and that, I fear, is the only remedy open to you in this case." So the lady, in order to liquidate the debt, "took his body," by marrying him.

THE *Law Times* of February 1, on the subject of Queen's Counsel tells us that, "Last Wednesday, the barristers who have been recently appointed Queen's Counsel, were sworn in before the Lord Chancellor, in his private room at the Law Courts. They were afterwards welcomed within the bar by all Her Majesty's Judges sitting in the High Court." It will thus be seen that in England a barrister, on being appointed a Queen's Counsel is required to be sworn in. There are some other peculiarities regarding English Queen's Coun

sel. In England no Queen's Counsel, can take a brief against the Crown except by license of the Crown, first obtained from the Crown, which, in England costs, it is said, about £9. In England no Queen's Counsel can accept a brief as junior counsel, but is compelled, by the etiquette of the profession, to confine himself to leading business. In England, a barrister, when he has attained a sufficient standing at the bar to warrant his giving up business as a junior, applies to the Lord Chancellor to be made a Queen's Counsel. The granting of the application, however, is in the discretion of the Lord Chancellor. There is, however, nothing *infra dig.* or unseemly on the part of the barrister in making such an application. It will be seen, therefore, that the mode of appointment, and the consequences of appointment of Queen's Counsel differ very much in Canada. In Ontario it has not been customary to require Queen's Counsel to be sworn, though why that preliminary to their exercising this office is dispensed with we do not know. Queen's Counsel hold briefs against the Crown in Ontario without obtaining any license for so doing; and they even take business as juniors, both in Chambers and in Court. If they apply to be appointed, it is too often not because their position at the bar entitles them to, and justifies them in claiming, the distinction, but principally because they or their friends think their services to the party machine merit the reward.

TRIALS IN CAMERA.

The case of *Malan* v. *Young*, an action to recover damages for alleged libel and slander by the head master of Sherborne school against an assistant master, was down for trial before Mr. Justice Denman and a special jury in the beginning of November last. Upon the case being called, Sir Charles Russell for the plaintiff, with the consent of Mr. Lockwood, Q.C., who represented the defendant, asked that the case might be heard *in camera*, upon the ground that a public trial would prejudicially affect the interests of third parties, who were not before the court. The learned judge at first doubted his power to make the order asked for, but after consulting some of his brethren on the Bench, he consented to hear the case in private, without a jury. The withdrawal under protest of "a barrister robed," who claimed the right to remain in court as one of the public, and as the father of boys who are being educated at Sherborne school, imparted a momentary dramatic effect to the prosaic, but by no means trivial, incident, and the hearing of the cause proceeded in private.

While the matter is still to some extent occupying public attention, it may be interesting and instructive to trace shortly the history of judicial practice in England in regard to the trial of actions *in camera*.

In 1860, a petition for declaration of the nullity of a marriage, reported as *H.* v. *C.*, in the first volume of Swabey & Tristram, at p. 606, came before Sir Cresswell Cresswell, as Judge Ordinary of the new Probate or Divorce Court. An application was made for a trial *in camera*, on the ground of the painful nature of the evidence to be adduced; but the Judge Ordinary, with the concur-

rence of Baron Bramwell and Justice Williams, held that he had no power to sit otherwise than with open doors; and this ruling governed the practice of the Divorce Court in petitions for declaration of nullity till 1864. In that year the case of *Marshall* v. *Hamilton* (3 Swabey & Tristram, 517) came on for trial before Sir J. P. Wilde, afterwards Lord Penzance. The evidence was so offensive that His Lordship heard it in private, with consent of the leading counsel engaged, and signified a desire that such cases should in future be tried *in camera*. From that time the practice of the Divorce Court reverted to the rules of the old ecclesiastical courts; suits of nullity, and even petitions for the restitution of conjugal rights (A.V.A., 3 Prob. & Matr., 230, 1875), being heard in private whenever the publication of their details would, in the opinion of the presiding judge, have been an outrage to decency and morals. To the power thus exercised by the Divorce Court there is a strange and somewhat illogical limitation. No suit for the dissolution of marriage can be heard with closed doors, even if both parties consent to privacy. The *raison d'etre* of this exception is partly historical and partly grounded in public policy. The old ecclesiastical courts had no power to grant divorce. The present Divorce Court was in substance created by the statute 20 & 21 Vict., c. 85. The 22nd section of that statute enabled and directed the new tribunal to follow the practice of the old ecclesiastical courts in all proceedings other than suits for the dissolution of marriage. No authority to hear divorce petitions in private was given by the statute. Nor was the omission unintentional, for an enabling clause in an amendment to the Divorce Act was rejected by the legislature (C.V.C., 1 Prob. & Div., 640, 1869). It was no doubt felt that the dissolution, like the solemnization, of marriage should take place under the eyes of the public.

In two other classes of cases * have the English courts hitherto asserted a right to order trial *in camera*: (1) where the public hearing of an action would defeat the purpose for which it was brought, and (2) where publicity would inflict an irreparable injury upon *one* party, without being absolutely necessary to the protection of the other.

Of the former class, *Andrew* v. *Raeburn* and *Mellor* v. *Thompson*, of the latter, *Badische Anilin* v. *Levinstein* may be taken as examples. Let us consider them in turn.

Andrew v. *Raeburn* (1874, 9 Ch.App., 522) was a suit to restrain the defendant from publishing certain letters. Lord Cairns, L.C., intimated that if the argument could not have been conducted without these letters being read aloud in court, he would probably have tried the case *in camera* without consent; but as the defendant's counsel undertook not to refer to their contents if the case was heard with open doors, a direct decision upon the point now under consideration was avoided.

Mellor v. *Thompson* (1885, 31 Chy.D., 55) went a little further. This was an action to restrain the defendant from disclosing information communicated to him as a solicitor. Upon an assurance by the plaintiff's counsel that a public

* It is unnecessary to deal here with the jurisdiction to order a hearing *in camera* in matters affecting lunatics or wards of Court.

hearing would defeat the object of the suit, the Court of Appeal made an order *in invitum* for a trial *in camera.*

In *Badische Anilin und Soda Fabrik* v. *Levinstein* (1883, 24 Chy.D., 156)—an action for the infringement of letters patent—the defendant, while under examination, stated that he was working under a secret process, the publication of which might do him an irreparable injury if the patent should turn out to be bad. Justice Pearson continued the trial for several days without requiring the defendant to disclose his process, but eventually called upon him either to do this or to submit to an adverse judgment. Thereupon the trial was continued with closed doors, and the process was made known to the Court, no one being present except the professional advisers of the parties.

From which of these three classes of cases does the ruling of Mr. Justice Denman in *Malan* v. *Young* derive its authority? There was no allegation that the character of the evidence required the exclusion of the public. So far from there being any danger that a trial with open doors would defeat the object of the action, the presumable object of the case was to make the vindication of the plaintiff's character at least as widely known as the libel which had aspersed it. It was not asserted that a public trial would do an irreparable injury to either party; and the mere prospect of painful disclosures being made is no ground for a hearing *in camera* (*Nagle-Gillman* v. *Christopher*, 1876, 4 Chy.D., 173). Is it part of the law of England that in an action for libel a Judge of the High Court may, on the bare assertion of an eminent counsel that the interests of third parties will be injuriously affected by a public trial, convert himself into a private arbitrator, and hear the case *in camera*?

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GRAVE-STONES, GRAVE-YARDS, AND GRAVE SUBJECTS.

"Let's talk of graves, of worms and epitaphs."

James the Seventh of Scotland (the gentleman who left England because of a difference with his son-in-law), in 1686, with the advice and consent of the estates of the Parliament of Scotland, passed a law saying that no corpse of any persons whatsoever should be "buried in any shirt, sheet, or anything else, except in plain linen, or cloth of hards, made and spun within the kingdom of Scotland, without lace or point, discharging from thenceforth the use of Holland or other linen cloth made in other kingdoms, all silk, hair or woollen, gold or silver, or any other stuff whatsoever than what is made of flax or hards, spun and wrought within the kingdom, and that under the pain and penalty of 300 pounds Scots, *toties quoties*, for a nobleman, and 200 pounds for each other person, whereof the one-half to the discoverer and the other half to the poor of the parish where the said corpse shall be so interred." While enjoying all the advantages and meekly bearing the burdens of la grippe, we meditated on this Scotch Act, and shuddered to think of the shirt or sheet of plain linen in this

horrible climate of 1890; we did not want any silk or cloth of gold or silver for our own particular winding-sheet, nor even lace or point, but we had a preference for woollen, or some other warm stuff. We felt relieved when we found that Charles II. had, with the aid of the Parliament at Westminster, enacted that the people of England should all be buried in woollen shrouds (30 Car. II., c. 3). We knew our friends would sooner give us soft warm winding-sheets wherein to wrap "that small model of the barren earth which serves as paste and cover to our bones."

The influenza filling our head prevented our clearly seeing how the *toties quoties* applied. How often is the same corpse interred in Scotland?

The Act of James likewise ordained that no wooden coffin should exceed an hundred merks Scots, as the highest rate for persons of the greatest quality, and so proportionately for others of meaner quality, under the pain of 200 merks Scots for the contravention. The "coffin trust" settles the price of these necessary articles now-a-days, and undertakers undertaking to fix rates are more to be feared in this year of grace than all the laws of all the Stuarts on the subject.

We are not sentimental about wishing to have cowslips and violets growing over our grave and flourishing on the disintegrating components of our body, still we were pleased to find that under our Cemetery Act no one can be buried in a vault or otherwise under any chapel or other building, because cold, damp, dank places are distasteful to our feelings (R.S.O., c. 175, s. 10). But why did our wise legislators forbid people being buried within fifteen feet of any such building or chapel? (*Ibid.*) Did they fear a disturbance of the foundation in the event of a resurrecting by medical students or otherwise?

A man who invests his capital in cemetery lots has certain advantages over his friends who invest in other kinds of real estate. For instance, burial sites are exempt from taxation of every kind; he may spend tens of thousands of dollars upon it, and yet snap his fingers at the assessor; they cannot be seized or sold under any execution; the owner is not put to the expense of registering his deed, nor can any judgment, mortgage or encumbrance subsist upon such lots (R.S.O., c. 175, s. 13 and 14). It would seem that a male owner cannot be troubled with any inchoate right of dower, or a female proprietor with that still more troublesome thing, tenancy by the curtesy. Yet after all, one's dealings in such real estate may be hampered, as appears from *Schroeder* v. *Wanzer* (36 Hun, 423). Here a gentleman purchased a lot in Greenwood cemetery for a place of burial for himself, his wife and family; considerable improvements had been made at the expense of both the husband and wife; her father and mother, one son and the husband's brother had all been buried in the lot, when the husband took it into his head to sell it, and he did sell and convey it to a stranger for a valuable consideration. The wife appealed to the courts, and it was held that she could restrain her husband from so conveying the lot, and was entitled to have a judgment specifically devoting the lot to the objects for which it had been purchased and improved. Not only did the court declare that equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made

valuable improvements in the property, "but went on to say that it would be offensive to the moral sense, and therefore should not be sanctioned by the court, after these bodies had there been buried, to permit the property to be made the subject of speculative disposition, with permission to the purchaser to remove them from their resting place. Such an interference with dust and ashes was not sanctioned by the common law" (*King* v. *Lyon*, 2 T.R., 733; *Com* v. *Cooley*, 10 Pick., 37).

Andrew J. Thompson was mean enough to borrow money from William Hickey upon his lot in Greenwood Cemetery, and then bring an action to have the conveyance given in consideration declared void, and to restrain the removal of the bodies of his children buried therein. The court was with him. Van Vorst, J., said that a lot purchased for a burial plot, in which interments had been made, is in such a condition that it cannot be mortgaged to secure the payment of a debt or the return of money borrowed, and that apart from legislative enactment. The conveyance to Hickey and subsequent transfers were declared void, and ordered to be delivered up to be cancelled. The Judge remarked, "the sentiments and feelings which people in a Christian State have for the dead, the law regards and respects, and however it may have been anterior to our legislation on the subject of cemeteries, the dead themselves now have rights, which are committed to the living to protect, and in doing which they obtain security for the undisturbed rest of their own remains. In any view which may be taken of this subject, I am sure," said the Judge, "that the defendants should be restrained from interfering with the children's graves. If the conveyance executed by the plaintiff to Hickey is supposed to confer any present right, it must yield to the easement of the bodies already buried there, which should in no event be disturbed" (59 How. (N.Y.) Pr. 434; see also *Moreland* v. *Richardson*, 22 Beav., 596; 24 *ib.*, 33; *First Presbyterian Church* v. *Second Presbyterian Church*, 2 Brewst (Pa.), 372.)

It appears, however, if the burial lot is unused, a sale, or conveyance, or mortgage may be good, for it would not be against good morals, public policy, or the spirit of the statute (*Lantz* v. *Buckingham*, 4 Lans., 484). Of course in Ontario the statute clearly forbids mortgaging burial lots in public cemeteries (*vide supra*), but does not refer to ordinary grave-yard lots.

A man seems more likely to find his grave his final resting-place if it is in a public cemetery than if it is in a churchyard. A New York Judge said that every person purchasing a grave in a churchyard does so with the full knowledge and implied understanding that change of circumstances may in time require a change of location (*Richards* v. *N. W. Protestant Dutch Church*, 32 Barb., 42). If a burial ground is expropriated in New York, the relatives of the dead are entitled to be indemnified against the expense of removing and suitably re-burying the remains (4 Bradf., 502). In the parish churchyards in England, corpses are expected *to remain in statu quo* only a reasonable time; the corpse—the cadaver (i.e., *caro data vermibus*)—of to-day must allow itself to be removed by the worms, so as to let the corpse of next year have a resting-place. This seems to be the meaning of *King* v. *Coleridge*, (2 B. & Ald., 806). There, in a parish of

30,000 souls, where 700 burials took place annually in the churchyard, the court would not issue a mandamus ordering the interment of a man in an iron coffin. Best, J., said: "The consequence of enforcing such a mode of burial would produce great public inconvenience; for in a few years the churchyard would be filled and a great additional expense cast upon parishioners in providing other places of burial for parishioners." Because a churchyard is not the exclusive property of one generation, but is the common property of the dead, the living, and the generations yet unborn, one cannot build therein a brick grave without the consent of the proper authorities (*Gilbert* v. *Buzzard*, 3 Phil., 335). In England, by statute, burial boards may sell the exclusive right of burial either in perpetuity or *for a limited period*, in any part of any burial ground provided by such board (15 & 16 Vict., c. 85, s. 33). Our statute authorizes deeds granting the lot of land itself to the purchaser, his heirs and assigns (s. 15).

In Illinois, a court of equity will enjoin the owner of land from defacing and meddling with graves on land dedicated to the public for burial purposes, at the suit of any parties having deceased relatives or friends buried therein. (The reporter does not say what the court would do were the relatives and friends buried not deceased) (*Davidson* v. *Reed*, 35 A.L.J., 157).

When we had pursued our meditations thus far, we naturally switched off to think of the monument that would be erected over our grave, and of the epitaph that lying living friends will put over us lying dead below. "For man is a noble animal, splendid in ashes, and pompous in the grave." It is satisfactory to know that tombstones can now be had on the "instalment plan," like pianos and sewing machines; but it is unsatisfactory to learn that the vendor of the tablet may enter upon your lot and remove it, should your sorrowing widow or impecunious representative neglect to pay the instalments. A point might arise if the widow acted without the consent of the representative (*Fletcher* v. *Evans*, 140 Mass., 241). Under our Act the directors of the cemetery company have power to make by-laws for managing the grounds, and for regulating the erection of tombs, monuments, or grave-stones (R.S.O., c. 175, s. 27). At common law the parishioner had no power to decide what should be placed on his grave, the ultimate control over that was reserved for the ordinary; so one naturally expects to find that the legislature, in passing the Act under which cemeteries were to be created to take the place of churchyards, would reserve to the managers of the cemetery a control analogous to that exercised by the ecclesiastical authorities at common law over churchyards (*McGough* v. *Lancaster Burial Board*, L.R., 21 Q.B.D. at p. 328.)

McGough paid to the Lancaster Burial Board a guinea, and received a conveyance granting to him, his heirs and assigns, the exclusive right of burial in a certain plot, subject to the regulations then in force or which might be thereafter issued with regard to interments in the cemetery by the burial board or other competent authority. He obtained leave to put up a grave-stone, which he accordingly did. He afterwards placed upon the grave a wreath, and to protect the wreath a glass shade, and to protect the glass shade, a galvanized wire covering. The board never allowed the placing of glass shades on graves in their cemetery, so they

removed this one and its covering without McGough's consent. Thereupon the offended Briton sued them in the County Court, and got a judgment for nominal damages and costs; but the board appealed, and the Queen's Bench Division held in their favour (L.R., 21 Q.B.D., p. 323). Mrs. Harris was more fortunate in her contest with the St. Pancras Burial Board: Mrs. Robotham had obtained from the board the right of constructing a private grave in the cemetery, and the exclusive right of burial and interment therein, to hold in perpetuity, for the purpose of burial, and of erecting and placing therein a monument or stone: with a proviso that if the monument or stone and the appurtenances should not be kept in order according to such regulations as should be made by the board, the grant should be void. In accordance with this grant, Mrs. R. placed her husband in her lot, and placed a head-stone and a kerb around the sides of the grave, leaving an open space at the top over the body without any stone or other covering; for ten years she kept this open space planted with flowers, employing her own gardener, and thus writing her sorrow "on the bosom of the earth." Then the board resolved to undertake the planting of flowers exclusively themselves, and they so notified Mrs. R. After this, Mrs. Harris—not the life-long friend of Sairey Gamp, whose existence Mrs. Betsey Prig doubted, but the wife and assistant of Mrs. R.'s gardener—went to the grave to plant some flowers (by Mrs. Robotham's request); she was told to stop, but went on digging in the space and sowing seeds, when Ashby, the officer of the board, forcibly prevented her. For this assault Mrs. H. summoned the man before the justices, who convicted him and fined him 1s., and 17s. costs. The case was appealed. The court sided with the ladies and upheld the conviction. Bovill, C.J., said, speaking of the exclusive right to a grave, "the grantee would be entitled to plant it, provided she did nothing that was offensive or unsightly. If I could have felt any doubt or difficulty in the matter, it would be very much removed by what Mrs. R. has from time to time been allowed without objection to do." Willis, J., said the board had no right to make special rules which would derogate from prior grants. That whenever memorials are allowed to be put up, they are always allowed to be repaired and decorated, even in places of worship. Byles, J quite agreed, and thought that surviving relatives would value the exclusive right of interment, because they then might plant the grave with their own hands, and from year to year renew the flowers. The Chief Justice thought that if the sorrowful widow could be prevented from planting her husband's grave, she might equally be prevented from visiting it (*Ashby* v. *Harris*, L.R., 3 C.P., 523). Poor Mrs. Robotham did not share in Lord Byron's sentiment when he wrote of the grave of his wife:

> "I will not ask where thou liest now,
> Nor gaze upon the spot:
> There flowers or weeds at will may grow,
> So I behold them not."

Some people have found it difficult to arrange satisfactorily for the maintenance of their tombs by their wills. Mrs. Bates, a Massachusetts lady (perhaps belonging to cultured Boston), inserted in her will a clause as follows, *verb. et lit.*:

"My house and furniture, silver plate, fixtures, and everything, to be sold, if there should not be enough from my husband's estate for a monument. I wish to have my money expended for a monument of granet, with four pillows like one in the grove, only larger, if there should be money enough left from my husband's estate. I want a momento of Hope, Faith and Charity, the expences to be taken from my own estate, and his name cut on the steps, the remainder left I wish to be kept in trust to beautify and keep the it in good order. I wish this to be carried strictly through." The court declined to allow the poor woman's wishes to be carried out, holding that the repair of a private monumental structure is a matter strictly individual and personal; that the fund constituted by the testatrix was to be expended for her own gratification upon an object in which the public had no interest, and which had no proper similitude to a charity; that the provision constituting the fund for the preservation, embellishment and repair of the monument or memento erected by her was therefore void, as seeking to create a perpetuity for a use not charitable. The right to sell even could not be exercised (*Bates* v. *Bates*, 134 Mass., 110; S.C. 45, Am. Rep.; see also *Piper* v. *Moulton*, 72 Me., 155; S.C. 39, Am. Rep. 748). In fact, it has been repeatedly held that a bequest to provide a fund for the permanent care of a private tomb or burial place cannot be treated as a private charity and thus made perpetual, but that such bequest is void (*Giles* v. *Boston Fatherless and Widows' Society*, 10 Allen, 355; *Doe* v. *Pitcher*, 6 Taunt., 370; *Lloyd* v. *Lloyd*, 2 Sim. (N.S.), 264).

Where a man bequeathed £500 in trust to apply such part of the income thereof as might be necessary in keeping in repair a family vault, and the residue in keeping up his brother's tomb and the parish churchyard, it was held that the gift to repair the churchyard was good, as a charitable gift for a public object, although the other gifts were void. North, J., said, "To put it shortly, I do not see any difference between a gift to keep in repair what is called 'God's house,' and a gift to keep in repair the churchyard round it, which is often called 'God's acre.' A testator providing for the repair of a family tomb is only ministering to his own private feeling or pride, or it may be to a feeling of affection that he has for his own relations, and it is not for the benefit of the parish at large that a particular tomb should be kept in repair. But in respect of the repair of the churchyard as a whole, it is for their benefit" (*Re Vaughan: Vaughan* v. *Thomas*, 33 Chy.D., 187; *Richard* v. *Robson*, 31 Beav., 244). A direction to a widow and another annuitant under a will to keep the testator's tomb in repair out of their life interests has been held good, and they were said to be under an obligation out of their annuities to do so according to the directions of the will (*Lloyd* v. *Lloyd*, *supra*). A man gave his executors £600 to invest, and directed them to apply the income in keeping in good repair his monument and all the tombstones and headstones of his relatives in a certain graveyard; and the surplus, if any, after annually defraying these expenses, was to be given to the poor and pious members of the Methodist Society at G. above the age of two score years and ten. The court held that the trust to keep in repair was honorary only, and that the old Methodists were entitled to the whole benefit of the money, to the utter

exclusion of the poor grave-stones (*Dawson* v. *Small*, L.R. 18, Eq. 114; see also *Hunter* v. *Bullock*, L.R. 14, Eq. 45).

The questions—important as they are—of who is entitled to the custody of a corpse and has a right to decide on the place of sepulture, and when the remains may be removed from one grave to another, we were going to consider, but the exigencies of time and place and space forbade; besides, Mr. John Howard Corwin, of the New York bar, has told the world nearly all that need be known on these points in his interesting paper on Burial Law, published by Diossy & Co., 231 Broadway, last year, and to his production we would refer the readers of THE CANADA LAW JOURNAL; he treats of the subject from the time when "the world was new" down to a few months ago. R. V. R.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We continue the cases in the January number of the English Law Reports:

MARRIED WOMAN—ATTACHMENT OF DEBTS—ORDER xlv., v. 1. (ONT. RULE 935).

A question arose in *Holtby* v. *Hodgson*, 24 Q.B.D., 103, whether upon a judgment recovered against a married woman upon which execution was limited to her separate estate not subject to restraint on anticipation, a sum of money payable under a judgment directed to be entered in favor of the married woman, could be attached before the judgment in her favor had been actually entered. The Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) affirming Mathew and Cave, JJ., held that it could—and that notwithstanding the judgment recovered against the married woman created no personal liability, the judgment creditor was nevertheless entitled to take garnishee proceedings.

WITNESS—ACTION FOR WITNESS FEES.

Chamberlain v. *Stoneham*, 24 Q.B.D., 113, shows that where under Rules of Court a witness is entitled to conduct money and payment of expenses and loss of time, if not duly paid, he may bring an action to recover them against the person by whom he was summoned.

STATUTE OF LIMITATIONS (3 & 4, W. 4, C. 27, S. 25) (R.S.O., C. 111, S. 30)—DEVISE ON TRUST —POSSESSION BY TRUSTEE FOR 12 YEARS—CLAIM BY HEIR-AT-LAW—"EXPRESS TRUST."

In *Patrick* v. *Simpson*, 24 Q.B.D., 128, the troublesome question as to what is "an express trust" within the Real Property Limitation Act (R.S.O., c. 111, s. 30) came up for consideration. The facts of the case were, that a testator had devised a house and all his other real estate to his executors upon trust, as regards the house, but without any declaration of trust as regards the rest of the realty. The executors went into, and continued in, possession of the rents and profits of the whole of the realty for upwards of twelve years. The present action was by the heir-at-law, claiming the realty as to which no trust was declared. The defence of the Statute of Limitations was set up;

and it thus became important whether or not the executors could be said to hold in trust for the heir-at-law by virtue of an "express trust." Upon the authority of a decision of Lord Plunket in an Irish case of *Salter* v. *Cavanagh*, 1 D. & Wal. 668, Huddleston, B., and Stephen, J., decided that though no trust was declared by the will of the property in question, the executors nevertheless held it under the will under "an express trust" for the heir-at-law, and therefore that the Statute of Limitations afforded no defence. The case was distinguished from the recent case of *Churcher* v. *Martin*, 42, Chy.D. 312 (noted *ante* vol. 25, p. 506) on the ground that in the latter case the deed to the trustees was null and void under the Mortmain Act.

LANDLORD AND TENANT—REMOVAL OF GOODS TO PREVENT DISTRESS—11 GEO. 2, C. 19, S. S. 1, 3.

The only point for which it seems necessary to notice *Tomlinson* v. *The Consolidated Credit & M. Co.*, 24 Q.B.D., 135, is the decision that statute 11 Geo. 2, c. 19, which gives landlords an action to recover double the value of goods fraudulently carried off the demised premises to avoid a distress, applies to the goods of the tenant only, and not to those of a stranger. In this case the tenant had given a bill of sale of his goods to the defendants who, with the tenant's consent, removed them to avoid a distress, and it was held by the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) affirming Field and Manisty, JJ., that the defendants were not liable under the statute.

ADMINISTRATION—PAUPER LUNATIC.

In the goods of Eccles, 15 P.D.1, the husband of the deceased intestate was a pauper lunatic confined in a county asylum. Notice having been given to her next of kin, and they not having appeared, the Court made a grant of administration to the guardians under whose care the husband was confined, for his benefit, and limited to such time as he should remain insane.

WILL — SIGNATURE OF LEGATEE WRITTEN UNDER ATTESTATION CLAUSE — OMISSION OF NAME IN PROBATE.

In the goods of Smith, 15 P.D. 2, presents some features of similarity to the recent case of *Re Sturgis, Webling* v. *Van Every*, 17 Ont. 342. After a will had been executed and duly attested by two attesting witnesses, the wife of the testator, who was also an executrix and took a life interest in the whole estate, signed her name to the will at the testator's request, not with the object of attesting it, but in order to verify its contents. Under these circumstances the Court granted probate of the will omitting the signature of the wife, after notice to infants having a reversionary interest under the will and no cause being shown to the contrary.

ADMINISTRATIO—DE BONNIS NON—ADMINISTRATOR ABSCONDED—REVOCATION OF GRANT.

In the goods of Covell, 15 P.D. 8, the administrator having absconded after partly administering the estate, and though several years had elapsed, no trace of him having been discovered, the Court revoked the grant, and made a fresh grant *de bonis non* to a residuary legatee.

ADMINISTRATION—GRANT TO COMMITTEE OF LUNATIC—ADMINISTRATION BOND.

In the goods of Morris, 15 P.D., 9, application was made for the grant of administration to a lunatic's estate. It appeared that the estate to be administered consisted of £10,000, of which all but £850 had been paid into Court, and the balance would shortly be also paid in. The Court made the grant and dispensed with security, except as to the £850, as to which a bond for £1700 was required to be given.

EXECUTORS—ADMINISTRATION—DISTRIBUTION OF ESTATE AFTER ADVERTISEMENT (R.S.O., c. 110, s. 36).

Proceeding now to the cases in the Chancery Division, the first which calls for notice is *In re Bracken Doughty* v. *Townson*, 43 Chy.D., 1. This was an action against executors for administration. The defence was that they had distributed the estate after publication of due notice under 22 & 23 Vict., c. 35, s. 29, (R.S.O., c. 110, s. 36); and this was held to be a sufficient answer. Some question was raised as to the sufficiency of the notice published, and North, J., held that there was no inflexible rule, that the notice must be published in a London daily newspaper of large circulation, or that a month should be allowed for bringing in of claims; but that the question as to the sufficiency of the notice depended on the circumstances of the particular case, such as the place of residence, or position in life, of the deceased. In this case, the testator was a small farmer, and had lived in the same place forty years previously to his death, and had never engaged in any other occupation than farming his own land, consisting of about fifty-two acres. The notice was published once in each of the local newspapers, and once in the London *Gazette*. The notice fixed a month from its date for bringing in of claims, but it was not published until a day or two after its date; and it was held by the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) affirming North, J., that the notice was sufficient, and that the executors who had distributed the estate, were protected from any further claim.

MARRIED WOMAN—WILL—MARRIED WOMAN'S PROPERTY ACT, 1882 (45 & 46 VICT., C. 75), S. 1, S-SS. 1, 2, 5. (R.S.O., C. 132, S. 5, S-S. 2).

In re Cano Mansfield v. *Mansfield*, 43 Chy.D., 12, is another decision upon the construction of the Married Woman's Property Act, 1882, 45 & 46 Vict., c. 75, s. 1, s-ss. 1, 2, 5. (see R.S.O., c. 132, s. 5, s-s. 2). In this case the married woman was entitled, under her marriage settlement made in 1863, to certain property which was thereby limited (in default of issue) upon trust for her absolutely, if she survived her husband, but if she should die in his lifetime, then upon such trusts as she should by will appoint, and in default of appointment, for her next of kin. During her coverture, by will made in 1886, she appointed the fund to trustees, in case she should predecease her husband, upon certain trusts, and she bequeathed to them upon the same trusts all the property she could dispose of by will. She survived her husband, and died without republishing her will, never having had any issue. The question, therefore, was

whether the will passed the estate, which vested in her absolutely on her husband's death? Kay, J., held the will to be inoperative as to this estate, and the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) affirmed his decision. It was admitted that, as the testatrix survived her husband, the will made in his lifetime was inoperative, unless under the Act she acquired the power of disposing of the property as separate property. This the Court held she did not, because the Act only makes property acquired after its passage separate property, whereas the right to the property in question was acquired in 1863.

PRACTICE—TIME FOR APPEALING—INTERLOCUTORY FINAL ORDER.

Blakey v. *Latham*, 43 Chy.D., 23, is useful for the expression of opinion of the Court of Appeal as to what is an "interlocutory" as distinguished from a final order. In this case the plaintiff's action having been dismissed with costs, he applied for leave to set off against these costs, costs payable to him by the defendant, partly in this action, and partly in another action between the same parties. One Green, the defendant's solicitor, claimed a lien on the costs, payable to the defendant, for his costs in this action. Kay, J., allowed the set off, but as regarded the costs of this action, subject to any lien Green could establish before the taxing officer. Green appealed, and the preliminary objection was taken that the appeal was out of time, the order being merely interlocutory, and the Court of Appeal (Cotton and Fry, L.JJ.) held that it was interlocutory. Fry, L.J., observes, "that where a final judgment has been pronounced in an action, and subsequently an order has been obtained for the purpose of working out the rights given by the final judgment, that order has always been deemed, and rightly deemed, to be interlocutory."

CHARITY—MORTMAIN—INTEREST IN LAND—BONDS OF HARBOUR TRUSTEES—9 GEO. 2, C. 36.

In re David, Buckley v. *Royal National Lifeboat Institution*, 43 Chy.D., 27, the Court of Appeal (Lord Coleridge, C.JJ., and Cotton and Fry, L.JJ.) affirmed the decision of North, J., that certain bonds issued by harbour trustees, and which constituted specific mortgages of a share of the bridge tolls and rates leviable under the act of incorporation of the harbour, were (as the bridge tolls were paid for passing over bridges on the land of the trustees) an interest in land, and, therefore, were impure personalty within the Mortmain Act (9 Geo. 2, c. 36); and therefore a bequest of them for charity was void, although it might, under *Turner* v. *London C. & D. Railway Co.*, 2 Chy.D., 201, have been otherwise, had the bonds amounted to a mortgage of the whole undertaking.

STATUTE OF LIMITATIONS—CHARGE OF DEBTS ON LAND—DEBT BARRED AS TO PERSONALTY, BUT NOT AS AGAINST REALTY—ADVERTISEMENTS FOR CREDITORS—CREDITOR SENDING IN CLAIM NOT EQUIVALENT TO BRINGING ACTION.

In re Stephens, Warburton v. *Stephens*, 43 Chy.D., 39, shows that in England where a testator has charged his debts upon his lands, that although a creditor's claim may be barred as against the personal estate, after the lapse of six years from the time the debt became due, it will not be barred as against the realty

until the lapse of twelve years. It seems, however, that the *rationale* of this decision is the fact that the land comes to the executors charged with debts, not as executors but as trustees, and that in that way a trust is created as regards the land which does not exist as regards the personalty. It may, therefore, be open to question whether in Ontario, since the Devolution of Estates' Act, this reasoning would be applicable, now that the duty of the executor is to administer both the real and personal estate of the deceased, and it may be that here a debt barred as to the personalty would be barred altogether, notwithstanding an express charge of debts upon the realty. Notwithstanding that the debt in this case was held to be not wholly barred as to the realty, Kay, J., nevertheless intimated an opinion, that as the effect of the charge was to make the debts payable rateably out of the real and personal estate, that as to the proportion payable out of the latter, it could not be recovered out of the realty, but on this point he gave no definite decision. One other point arose in the case. The executors had advertised for creditors, and a creditor sent in his claim, it was never admitted, and after six years had elapsed, the executors then took out a summons to have the claim adjudicated upon. It was argued, that the sending in the claim was equivalent to bringing an action, but Kay, J., it is almost needless to say, refused to assent to that proposition.

SOLICITOR AND CLIENT—MORTGAGE BY CLIENT TO HIS SOLICITOR—PROFIT COSTS, RIGHT TO CHARGE.

The short point decided by Kay, J., *In re Roberts*, 43 Chy.D., 52, was simply this, viz.: That where a solicitor takes a mortgage from his client to secure a loan made by himself, he cannot charge his client with profit costs for the preparation of the mortgage. The reasons given for the decision do not appear to be very conclusive, and the case apparently is not covered by any previous authority. There seems to be really no more reason why a solicitor should not be entitled to recover profit costs of a mortgage drawn in his own favor, than that he should not recover profit costs of an action which he brings or defends in person, and yet in the latter case his right to profit costs is, we think, undeniable.

WILL—ADMINISTRATION—COVENANT BY TESTATOR TO PAY ANNUITY—APPORTIONMENT OF LIABILITY BETWEEN DEVISEE FOR LIFE AND REMAINDERMAN.

In re Harrison, Townson v. *Harrison*, 43 Chy.D., 55, a testator having made a covenant to pay an annuity, made a will devising his real estate to certain persons for life with remainder over in fee. The personal estate proving insufficient to meet the liability on the covenant, it was held by North, J., that the annuity must be treated as a debt of the testator, and that it must be apportioned among the estates devised according to their respective values, and that each tenant for life on paying his proportion of the annuity would be entitled in respect of the amount paid to a charge on the *corpus*, but was not entitled to recover any interest on the amounts so paid.

BUILDING SOCIETY—ARBITRATION—AGREEMENT TO REFER—APPOINTMENT OF ARBITRATORS AFTER ACTION.

In *Christie* v. *Northern Counties Building Society*, 43 Chy.D., 62, an application was made by the defendants to stay proceedings and to refer the dispute to arbi-

tration in pursuance of the rules of the defendant society. These rules provided that disputes between the society and any member should be settled by a reference to arbitration, and that five arbitrators should be elected by the members at a general meeting, of whom three should be chosen by lot by the complaining member to decide the matter in dispute. No arbitrators were elected under the rules until after the action was commenced, and it was held by North, J., that as the rules contemplated the election of a standing body of arbitrators, out of whom three were to be chosen, that the society could not, after litigation had been commenced, select the tribunal to decide it, and the application was therefore refused.

WILL—CONSTRUCTION—CODICIL—EXECUTION OF POWER.

In re Blackburn, Smiles v. *Blackburn*, 43 Chy.D., 75, North, J., was called on to decide whether a power of appointment had been well executed under the following circumstances: A husband having, under a settlement, after the decease of his wife, a testamentary power of appointment, before her decease made a will of all property he "might be possessed of, or over, which he might have power of bequest or disposal at the time of his death." After his wife's death he made a codicil confirming his will. The learned Judge held that although he could not execute the power in his wife's lifetime, the effect of the codicil was to reiterate the words of the will, and therefore the power was well executed.

PRACTICE—PARTITION ACT—INQUIRY AS TO PERSONS INTERESTED.

In *Wood* v. *Gregory*, 43 Chy.D., 82, which was a partition action brought in respect of an estate valued at £10,000, North, J., refused to determine on affidavits at the hearing who were the persons interested, but directed an inquiry, although conceding, that where the estate was of small value and the case simple, the inquiry might be dispensed with.

Correspondence.

DIVISION COURT LAW.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—By section 207 (2) of the Division Courts' Act it is provided that "in all actions or other proceedings brought in a Division Court, in which the plaintiff *fails to recover judgment*, by *reason* of the Court having no jurisdiction over the subject matter thereof, the judge presiding in the Court shall have jurisdiction over the costs," etc. R. 1256 (of Consolidated Rules) makes a similar provision as to County Courts and Division Courts.

Now, in order to give the judge authority to deal with the costs, it would seem to be necessary that it first should appear that the plaintiff's failure to recover judgment was *wholly* dependent on the want of jurisdiction of the Court.

Suppose, in the opinion of the judge, the plaintiff would fail, even if the Court had jurisdiction, could it be said that he failed to recover judgment because the Court had no jurisdiction?

Construed strictly does not the rule mean this, that upon the case being heard, the plaintiff would, in the opinion of the judge, be entitled to judgment, but for want of jurisdiction in the Court, and on that account having failed to obtain judgment, the judge has authority to deal with the costs?

Should not the section or rule be amended so as to provide "that in all cases where the plaintiff fails to recover judgment, or where the case or matter shall not *be heard or disposed of*, by reason of the Court not having jurisdiction," etc?

Yours, etc.,

February 20th, 1890. JUSTITIA.

[Without a recast of the whole subsection, or a special provision by independent enactment, it would be difficult to provide for a case which would "*not be heard or disposed of*" by the judge in open Court. An objection to the jurisdiction might be put in with the defence note; the plaintiff on receipt of that may decide to withdraw the case, or not go on with it. We do not see how the judge would, under the proposed amendment, have power or authority to order costs to the defendant, if any were incurred.—ED. C.L.J.]

IMPRISONMENT FOR DEBT.

To the Editor of THE CANADA LAW JOURNAL.

SIR,—I have read the letter of your correspondent, "Justitia," and notice that you invite opinions from men experienced in the administration of Division Courts' Law. With reference to the proceeding by judgment summons, I would say that I do not regard the procedure as one savouring of "imprisonment for debt" in the ordinary sense of that expression. It is not the *theory* but the *fact* of calling upon a man to answer for his fraud or neglect to pay what he justly owes, and for withholding from his creditors that which is their due—he having the means of satisfying a judgment. Some years ago, the *London Free Press* published articles suggesting the expediency of abolishing the right to sue for small debts altogether. Such a course would have the tendency to bring upon men of small means great hardship, because to some extent the credit system is essential to many. It is a well established fact that the very existence of a tribunal which can make a man honest enough to pay his debts if he is able, though unwilling, causes many to pay what they owe, who would not but for the knowledge that the legal machinery exists whereby they can be sued for their debts. So it is with regard to the proceeding by judgment summons. Many persons would not, were the clause referred to by your correspondent repealed, pay their creditors at all, and so long as they could get into debt, would, without scruple, let their creditors remain unpaid. It is well known that in some counties the administration of this law is so wisely and temperately administered that many thousands of dollars are collected without imprisonment, which would not be

collected but for the order for commitment. This order of commitment is in truth a necessary consequence of indifference or dishonesty, and actual imprisonment seldom takes place. In other counties there is so much laxity and sympathy for the poor debtor, and so little for the poor creditor, that creditors are often unwilling to sue in the Division Court at all, and a careless administration of the law in some counties prevents its being as useful as it ought to be, and might be. I think the law needs no revision, unless it be in matters of mere detail. Its principles must be retained whilst the credit system exists, and this system is so largely (and, I admit, so injuriously) engrafted into the transactions of the country, that no change should, in my opinion, be made in the direction indicated.

Feb. 22, 1890. Yours, etc.,

SENEX.

[Our correspondent has had a very large experience in this matter, and we attach much weight to that fact. His views are, we may say, substantially our own. We should, however, be glad to hear from others on the subject.—ED. C.L.J.]

Notes on Exchanges and Legal Scrap Book.

CAN DIRECTORS OF A COMPANY OVERDRAW?—This was the question raised in a case before the Chancery Court of Lancashire. The liquidator in the winding up of this company desired to obtain the direction of the Court as to the mode of proceeding in the matter of a deposit entered into by the directors of the Ebenezer Loan Company. It appeared that the directors of this company had overdrawn its account at the bank, and having a further need of money, the directors decided to ask for a further overdraft. Application was accordingly made, and the title-deeds of certain property deposited as security. The liquidator considered the company held no power to give such security. Liquidator's counsel argued that no power was given to the directors by the memorandum or articles of association of the company, to give such security, and contended that a power to make a deposit by deed should be obtained at a special meeting of creditors. The question was one in which they must distinguish between the company and the directors if any objection at all could be made to the security. It was upon that distinction that the articles of association prescribed exactly what powers the directors had. The Vice Chancellor ultimately decided that, having regard to the affidavit of the official liquidator, and to the statement as to the memorandum of association and the articles of the company, he was of opinion that the liquidator ought to resist the demand made upon him by the bank to execute a legal mortgage of the property, and to be authorized to demand from the bank the delivery up to him, as official liquidator, of the deeds comprised in the memorandum of the deposit within the period of three weeks, the costs of the liquidator, and of parties appearing, to be costs of the liquidation, with authority to take such other steps as might be advised.—*Law Journal.*

DIARY FOR MARCH.

1. Sat.....St. David.
2. Sun.....*Second Sunday in Lent.*
3. Mon.....Serfdom abolished in Russia, 1863.
4. Tues ...Court of Appeal Sits. General Sessions and County Court Sittings for trial in York.
5. Wed.....York changed to Toronto, 1834.
9. Sun.....*Third Sunday in Lent.*
10. Mon.....Prince of Wales married, 1863.
13. Thu.....Lord Mansfield born, 1704.
16. Sun.....*Fourth Sunday in Lent.*
17. Mon.....St. Patrick's Day.
18. Tues ...Arch. McLean, 8th C.J. of Q.B., 1862. Princess Louise born, 1848.
23. Sun.....*Fifth Sunday in Lent.*
26. Wed.....Bank of England incorporated 1694.
58. Fri .....Canada ceded to France 1632.
30. Sun. ...*Palm Sunday.* B.N.A. Act assented to 1867. Reformation in England began 1534.
31. Mon.....Slave Trade abolished by Britain 1807.

Reports.

ENGLAND.

COURT OF APPEAL.

(Reported for THE CANADA LAW JOURNAL, by A. C. Galt, Barrister-at-Law, Toronto.)

MULLER *v.* NASH.

Solicitor's liability—Misappropriation before partnership—Improper investment—Liability of firm—Negligence—Damages.

D. and N. entered into partnership as solicitors, in September, 1885. D. had previously received £450 as solicitor for M.

In January, 1886, M. instructed D. & N. to reinvest the money on a mortgage of the life interest of W., in £2,000 (under a marriage settlement), and an assignment of a policy for £600, on W.'s life. These securities were vested in D., but were already mortgaged by him to their full value, of which M. had no notice. At D.'s request, M. executed a reconveyance (prepared by the firm) of the property originally mortgaged to her, and in February, 1885, D. executed a mortgage and assignment (also prepared by the firm) of the new securities, in favor of M., but no notice thereof was given to the trustees of the marriage settlement or to the insurance company. In May, 1887, D. paid off the prior charge on the securities, and sold them to H. for £350. The insurance company went into liquidation, and D., after having paid a year's interest to M., died a bankrupt, in July, 1887.

Held, affirming Grantham, J., that N. was liable for the fraud and negligence of D.; that the debt due from D. to M. at the date of the partnership, was capable of being treated as money in the hands of the firm for investment; and that the measure of damages was the amount of M.'s loss, irrespective of the insolvency of D., or of the insurance company.

[GRANTHAM, J., Nov. 7, 1888—C.A., Mar. 30, 1889.

Action for damages against defendant, as member of a firm of solicitors, for fraud and negligence.

The plaintiff had employed Messrs. Deane & Chubb, as her solicitors, to invest £450, and they invested it on a mortgage. Chubb died in May, 1885. In July, 1885, the mortgagor repaid the money to Deane, who appropriated it to his own use. On September 1st, 1885, a partnership was formed between Deane and the defendant, under the name of Dean & Nash, notice of which was given to the plaintiff.

In January, 1886, Deane informed the plaintiff that the mortgage had been paid off, and he received instructions from the plaintiff to reinvest the money upon a mortgage of certain securities, suggested by Deane, the particulars of which were not given to the plaintiff. A reconveyance of the prior mortgaged property was thereupon prepared by a clerk of the firm, under the instructions of Deane, and was executed by the plaintiff. In February, 1886, a mortgage and assignment from Deane to the plaintiff were also prepared by the firm, whereby Deane purported to mortgage the life interest of one Woodhouse in £2,000 (under a marriage settlement), and to assign a policy for £600 in the Briton Medical Insurance Company, upon the life of said Woodhouse, to the plaintiff.

These securities had, by various assignments, become vested in Deane, who had already mortgaged them to their full value. No notice of the plaintiff's mortgage or assignment was given either to the trustees of the marriage settlement or to the insurance company, but Deane paid interest to the plaintiff for about one year. On May, 17th, 1887, Deane paid off the prior charge upon the securities, and a few days later, sold and assigned them to one Hartland for £350, without the plaintiff's knowledge. The insurance company had gone into liquidation, so that the value of the life policy was greatly depreciated. Deane died, hopelessly insolvent, in July, 1887.

At the trial before GRANTHAM, J., on Nov. 7th, 1888, *Willis*, Q.C., appeared for the plaintiff; *Bompas*, Q.C., for the defendant.

It was admitted on the part of the plaintiff, that the defendant was entirely innocent of any personal misconduct, and it was shown that he had no knowledge of the particular acts complained of.

The defendant contended, amongst other

things, that the plaintiff was merely in the position of a creditor of Deane, who was shown to have been perfectly insolvent from the time he received the plaintiff's money in July, 1885, down to his death in July, 1887, so that the plaintiff had suffered no special damage by reason of the subsequent negligence. Upon this point the following discussion took place:

Mr. JUSTICE GRANTHAM.—That does not follow, because many a man is bankrupt for years, and goes on trading, and people get securities and get paid during all that time.

Mr. Willis.—Yes.

Mr. Bompas.—They may; but surely that is not a thing to be assumed of a bankrupt man that he will pay all his creditors.

Mr. JUSTICE GRANTHAM.—Not "all." We have nothing to do with "all," only with one.

Mr. Bompas.—Surely it is not to be assumed as evidence that he could pay a particular creditor.

MR. JUSTICE GRANTHAM.—That may be, but it is a negative. You have to show that he would not—or could not—have paid Miss Muller.

Mr. Bompas.—I should have thought that I did *prima facie* show it, if I showed that he had no money, and had spent this money.

At the conclusion of the evidence the following judgment was delivered:—

GRANTHAM, J.—I am of opinion in this case that my judgment must be for the plaintiff, and with regard to the amount, I cannot say positively that the security was of the value of £450 at the time that Mr. Bompas relies upon; but I do not think I should be justified in saying that it was not, on the evidence that has been given by Mr. Nash. No doubt, Mr. Dixon Hartland only gave £350 for it; also, that to a certain extent the security was diminished in value, from something that had happened in reference to the Briton office. I do not know whether it was a fire office or a life office, but I suppose it was a life office. Still, I do not think that is sufficient evidence to justify me in saying it was worth only £350. Therefore, under the circumstances, I think my judgment must be for the whole amount; because, after all, the amount is not a question of so very much importance. I am very sorry, for Mr. Nash's sake, that my judgment must be against him, because it is quite clear that he is as innocent in this transaction as Miss Muller. Mr. Nash has been defrauded, and I do not see anything that has happened in this case to justify me in thinking that Mr. Nash was, himself, personally negligent, as was suggested in the case of *Cleather* v. *Twisden*, I think, where it was stated that the other partner ought to have known what was going on, and there was sufficient evidence to have brought it home to him. I think that Mr. Nash also, by the evidence which he has given, has shown that he is an honourable man, and that there was nothing to justify him in supposing that his partner was defrauding him in this transaction at this particular time, or defrauding anybody else; but I have to decide on law, and what I believe to be the law, as applicable to a case of this nature, and although it is not necessary to say what I should have done if Mr. Willis had relied on what he suggested would have been his contention, certainly my impression at the present time is that I should have decided against him if he was simply suing for the money received by Mr. Deane, on the ground that Mr. Nash would be liable for money received by Mr. Deane, at the time it has been proved he did receive it. I do not think Mr. Nash would have been liable. But it is not put upon that ground. It is put upon the ground that Miss Muller was the client of the firm at the time that this transaction, the subject of this action, was carried out. Now, it is quite clear that she was a client of the firm at that time, because I have before me a copy of the book of the firm; whether it is the petty cash book, or account book, or ledger, or bill book, does not signify (it is the bill book, I think), and in that book appears the names of Miss A. M. R. Muller and Puttock. This is in the book of Deane & Nash; and there is the charge against her of £9, 15s. 8d. It turns out—as it generally does in these cases—that they get the money from Messrs. Raper & Freeland afterwards; but Miss Muller is the person, as far as I understand, who is charged, and supposing they did not get the money from Raper, I should be very much surprised if they could not recover it from Miss Muller. Miss Muller is their client, and it is only by arrangement that they get the money from the other side, the mortgagee. But supposing there is any difficulty in getting it, I should think that Miss Muller would be responsible to them because, as she says herself, she considered she was going there as a client to the firm of solicitors, and would be responsible

for a bill of costs. Therefore, in this case, as far as the payment of the money is concerned, and the re-transfer of the first money which had been lent to Mrs. Austin, she appears as their client. Then she goes to them in exactly the same position. The only alteration which has occurred is this—that Mr. Nash, or Mr. Deane, with the consent of Mr. Nash, or Mr. Nash, with the consent of Mr. Deane, or Messrs. Deane & Nash, have jointly sent a notice to her that, in future, her transactions would not be transactions with Deane & Chubb, or with Deane (Chubb had died at this time), but that they would be transactions with Deane & Nash, if she comes there, at least, unless any special arrangement is made. She comes there to him as a client of Deane & Nash, with the knowledge—it must be taken to be—of Mr. Nash. It must be taken to be with the knowledge of Mr. Nash, because the notice has been sent out to her as, I suppose, it was sent to all the clients of the old firm of Deane & Chubb. Then, what is her right when she comes there under those circumstances? Why, the right of believing that Mr. Nash will be responsible for all actions which Mr. Deane is responsible for, for anything done or left undone, *qua* solicitor, any work that is done by either of the partners for her, and in the same way as when she came in September or October (I think it was September).

Mr. Willis.—September, my Lord.

Mr. JUSTICE GRANTHAM.—In the same way as when she came in September. If Mr. Deane was not there, Mr. Nash took the money and handed it over to Mr. Deane, so on this occasion if anything had happened to Mr. Deane, and Mr. Deane had not been there, Mr. Nash would have acted as the partner who would have carried out the transaction. Supposing it had not been, I mean that Deane had taken the money, that this particular question had been put on one side, and that somebody else had been the mortgagor, why then, Mr. Nash would have carried out the transaction, and Miss Muller would have been the client of Deane & Nash, exactly in the same way that she was the client of Deane & Nash, although Mr. Deane did the business. Then, what is the business that is done? Why, the business that is done is a mortgage or an assignment of a security to secure this sum of £450. That is what she goes there for. She says, "you must give me the money unless you find me a mortgage." It is a little bit doubtful whether she knew (I think she did) that it was Mr. Deane's own property. I think we may infer that she did gather from him that he would be the mortgagor, that he would convey, or that he would assign this property to her in which he was interested. Then he fails to do it, and although the deed itself bears date the 1st Feb., it is proved, I think, by the entry in Mr. Phillips' book that it was not drafted until the 19th. I should like to look at that book; I have not seen it.

Mr. Bompas.—The 13th, your Lordship will find it is.

Mr. JUSTICE GRANTHAM.—The 13th, is it? I thought it was the 19th.

(Book handed to His Lordship.)

I see that on the 4th there is an entry by Mr Phillips of Chubb & Muller in reference to work done by him—something or other, in this transaction. There is no date of the 4th Feb. in the bill, but there it is in the book "Chubb & Muller" (and Chubb was not the client) "draft transfer" Chubb was not the client as far as I understand of Deane & Nash, therefore, Muller there would be treated as the client.—However, we are dealing with what happened on the 13th, and so far as that entry is concerned, that is drawing the mortgage, I think it is—

Mr. Willis.—Yes.

Mr. JUSTICE GRANTHAM.—Whether he prepared this document himself or not, I do not know, or whether he really did the draft of it, or copied it, I should imagine that it would be a copying clerk who did that. How is that?

Mr. Bompas.—I think it was a copying clerk, my Lord.

MR. JUSTICE GRANTHAM.—I think it is very likely that the articled clerk would not copy this, but that it would be done by a copying clerk. Therefore, that would be done by the clerks of the firm. As far as Miss Muller is concerned, therefore, she goes there as a client of the firm, and as far as she knows, the work is done by the clerks of the firm, and, in fact, as a matter of fact, the work is done by the clerks of the firm, and not by any clerk of Mr. Deane's alone. As an articled clerk, as I have suggested, if might be that Mr. Deane would have a right to use the sevices of Mr. Phillips for his own private purposes somewhat differently to what

he would the services of an ordinary clerk ; but as far as this is concerned, it is quite clear he was doing it as a clerk of the firm, doing general work for them, especially when I see that there is the other entry on the 4th February in his diary—"Chubb & Muller, draft transfer"—which, I suppose, he prepared in the same way that this draft mortgage was prepared. However, there it is, the mortgage itself is copied by a clerk of the firm, and also, I ought to say, the payment of the stamp is entered in the books of the firm, in the ordinary way, as an ordinary outgoing on behalf of Mr. Deane, the client ; and the very entry before this one of "Deane & Muller" is "Deane" and somebody else, where there is another charge ; and where it is charged to him it is put down in the book, and he is treated as a client of the firm. It is quite clear that Mr. Nash knew he was a client of the firm, because he has told us he knew of this work that was being done, and he did, himself, a good deal of it, and there are the charges there against Mr. Deane, £5 in one case, and a good many other charges in other cases, and his name appears as a client of the firm, and, therefore, any question of custom, it seems to me, is got rid of in that way, by the fact that here it was done with the consent of Mr. Nash, with his full knowledge and full consent. Under those circumstances, I think that Mr. Nash must be responsible for the actions of Mr. Deane in work which was done as ordinary legal work, and that being so, that (which is not denied) which ought to have been done (viz.: —A notice given to the office of a company and also to the trustees of the marriage settlement) not having been done, it was negligence on the part of the firm not to have done it ; and, under those circumstances, the firm is responsible for the negligence which resulted in this loss, and I do not see my way to apportion the loss in any other way than saying that in consequence of that negligence and damage which Miss Muller has sustained is the sum which she has lost, viz.—£450.

Mr. Bompas—Will your Lordship stay execution, that we may appeal if we see fit ?

Mr. JUSTICE GRANTHAM.—I think so. I think this is a case of considerable importance.

The defendant appealed, and the appeal was heard on the 30th of March, 1889.

Bompas, Q.C., for the appellant.

F. Mote for the respondent, was not called upon.

THE MASTER OF THE ROLLS.—I think this appeal must be dismissed.

Miss Muller had been a client of the old firm. The first thing that Mr. Nash has to do with it is to inform her, "If you will continue to do business with the firm, that firm will now be Deane & Nash, and Deane & Nash will act for you as your solicitors." That is the first step, and that is done with the knowledge of Mr. Nash. Thereupon Miss Muller goes to the firm, and states that she will continue dealing with the firm, and she instructs the firm to obtain a mortgage for her. It is not correct to say that she knew that she was to lend her money to Mr. Deane, either on his personal security or on a mortgage by him. That is not true—she did not know that. Therefore it is not like that case that has been cited to us where the solicitor says, "I have property in the country, and I will give you a mortgage on my property," and then the man goes down to look at the property, then he knows all about it, he knows then that one partner of the firm of solicitors is to be the mortgagor ; but this lady did not ; she went to that firm—whether she began the conversation or not is wholly immaterial—she instructed Mr. Deane, believing that she was instructing the firm—intending to instruct the firm—to lend her money on the mortgage, the terms of which were not supplied to her—a mortgage of property belonging to Captain Woodhouse. Those are the instructions which she intends to give to the firm, to invest her money on a mortgage described to her, though not fully described to her.

Now, Mr. Deane was the agent of Mr. Nash to accept a client—that is obvious. Mr. Nash had sent word to this lady that Deane and he were partners, and hoping that she would continue the employment of that firm as her solicitors. Therefore he had given Deane authority to accept her instructions as a client of the firm. Then when she gives those instructions to Deane he accepts them.

In my opinion, when he so accepted them, he accepted them as one of the partners of the firm, and the firm, therefore, became her solicitors for that purpose—the firm did.

Now, what was the duty of the firm in that case as her solicitors ? why, to see that her money was invested upon a mortgage to a Cap-

tain Woodhouse ; to see that the mortgagor's title was all right ; to see, if it were necessary, that proper notices should be given to all parties ; in truth, to act for her as her confidential solicitors in investing her money in that way. That is what the firm were employed to do, and what they undertook to do. From that moment everything that was done was done by Deane, or by clerks paid by both Deane & Nash. There was nothing done by a clerk who was the clerk of Deane alone, and paid by Deane alone for doing it ; it was done by the clerks of the firm ; and, what is more, here in a book of the firm, the clerk who copies the mortgage or drafts the mortgage, puts it down as a mortgage which is being conducted for Miss Muller. Then there is the other entry in the book, by some other clerk, who pays the stamp duties out of the money of the firm—he puts that down as a charge to Miss Muller. Everything that was done from the time that retainer was accepted was done in the office by the clerks of the firm. Then is it possible to say that whatever was omitted to be done was omitted to be done by the firm, just as much as what was done was done by the firm? Therefore the things which it was the duty of the firm to do were omitted by the firm. That is negligence on the part of the firm, and for that reason I think the firm was liable.

Then, what are the damages? The damages are what she lost. In my opinion she lost £450.

I may express my opinion that as to the personal honour of Mr. Nash, it is absolutely and wholly untouched ; he has been deceived by a fraudulent partner.

LORD JUSTICE FRY.—I can well understand that in this case the appellant, Mr. Nash, may feel that the decision of the Court against him has been hard ; but when one or other of two innocent persons must suffer for the wrong of a third person, the sufferer always feels that the judgment is a harsh one. The Master of the Rolls has already said that nothing has occurred in this case to impeach the honour of Mr. Nash ; therefore, in that sense, it is hard that he should have to pay for the defaults and misbehaviour of Mr. Deane ; but he had the misfortune to enter into partnership with a man whose character was such that he was likely to involve his partner in trouble—that is the long and short of this case.

Now, at the time of the partnership, the position of things was this, that Miss Muller was the creditor of Deane for a sum of £450, which Deane had received on her account, a few months before. After the partnership had been formed, and a circular had been received by her which invites her to continue her connection with the new firm, she sees Mr. Deane ; and, in my opinion, sees him as a member of the new firm of Deane & Nash ; and thereupon a conversation ensues between her and Deane with regard to this sum of £450. Deane, in the first place, proposes to borrow it of her, on his personal security, which she, with great prudence and propriety, declines. Thereupon he proposed the loan, and mentioned the life policy on Captain Woodhouse's life, and some property in the new three percents. That was the subject on which he proposed that the money might be invested, and she assented to that.

I have come, without much hesitation, to the conclusion that the name of the mortgagor was not mentioned to her. If Mr. Justice Grantham had come to a decided conclusion the other way, I should have felt probably bound to submit to his view, because he saw the witnesses ; but I do not think he has. He says he thinks she knew who the mortgagor was, but it is doubtful. That is not a finding of the learned Judge.

Therefore, we have to look at the evidence. Now the probabilities of the case are very strong that he would not name himself as the intended mortgagor, after she had refused to lend the money to him personally.

In the next place, I think, after what had taken place, she would have recollected the name of the mortgagor, if the mortgagor had been the person to whom she had just refused to lend ; and what is more important than all that speculation as to the probabilities of the case, I think the fair result of her evidence is that he did not mention the name of any mortgagor, and I do think she would have recollected if he had named himself. Therefore, I do not believe that any mortgagor's name was mentioned.

Now, in my judgment, it was within the business of the firm to accept a retainer from Miss Muller to lend the sum of £450, which was then in the character of a debt due from one of the members of the firm to her upon a mortgage of a particular named property ; this was not the case of receiving money for a client generally, no doubt, but it was an undertaking to carry

through a mortgage upon the particular property. That, I think, was within the partnership, and I do not think that the transaction was affected by the secret fraudulent intention which, it is said, was in the mind of Mr. Deane. I think Miss Muller gave the retainer to Mr. Deane as a member of the firm ; I think that he accepted that retainer, and by so doing he bound Mr. Nash.

Now, what was the duty of a solicitor as soon as that retainer had been received? It was, in the first place, to see to the proper preparation of that mortgage ; and the moment it came to his knowledge that the proposed mortgagor was a member of the firm, that ought to have been disclosed to the client. But further than that, he was bound to see that the mortgage was a proper mortgage—in fact, it was a most improper mortgage, for it was a mortgage of the equity of redemption of this property which was mortgaged up to the hilt. Therefore, there was, on the part of Mr. Deane, an entire default in his duty, as the solicitor of Miss Muller, and, inasmuch as he was acting in that character of solicitor to Miss Muller, as a partner with Mr. Nash, Mr. Nash was unfortunately affected by that default and negligence of Mr. Deane, and must answer for them.

Mr. Bompas has not satisfied me that if the firm had done their duty the £450 would not have been forthcoming, therefore the measure of damages is the amount in question.

LORD JUSTICE LOPES.—I am of opinion in this case that there was a retainer of the firm by Miss Muller, a retainer which was accepted by Deane as a partner of the firm of Deane & Nash. It is in that way that Miss Muller became a client of the firm.

Now, in those circumstances, what was the duty of the firm? It was their duty, putting it shortly, without travelling over ground that has already been covered, to see that a safe mortgage was obtained for her. I agree with what has been said, and I do not think that there was any intimation conveyed to Miss Muller that Deane himself was to be the mortgagor. A mortgage was obtained, of which Deane himself was the mortgagor ; that mortgage subsequently turned out to be no security at all ; it was only an equitable mortgage ; the legal estate was outstanding ; there was a previous mortgage ; the property was sold, and the money resulting from the sale was not sufficient to pay the first mortgage, and in that way Miss Muller lost her £450.

In these circumstances I think Mr. Nash is liable in damages for the neglect of his partner, Deane, in conducting the business of the firm.

With regard to Mr. Nash, I desire to make an observation which has been already made, but I desire to repeat that it is my opinion that his conduct is unimpeachable. He has had the misfortune (not an uncommon misfortune) of being the partner of a dishonest man, and in that respect one sympathises with him.

With regard to the measure of damages, I think Miss Muller was entitled to that which she had lost, namely, £450.

Solicitors : *Mote & Son, Bompas, Bischoff, Doagson & Coxe.*

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

GALT, C.J.] [Jan. 14.

GRANT *v.* THE PEOPLE'S LOAN AND DEPOSIT COMPANY.

Contract—Interest post diem—Damages.

This was an appeal by the defendants from the judgment of GALT, C.J., and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, JJ.A.,) on the 10th of February, 1890.

Delamere for the appellants.

Beck for the respondents.

The action was one for redemption, and the chief question involved in the appeal was the construction of the following proviso for payment contained in the mortgage, in respect of which the action was brought : "provided this mortgage to be void on payment . . of $7,500 . . on or before the 1st day of June, 1884, with interest thereon at the rate of ten per cent. per annum until such principal money and interest shall be fully paid and satisfied."

The defendants were allowed by the referee interest after the first of June, 1884, as damages and at the rate of six per cent., and his ruling was affirmed by GALT, C.J.

At the conclusion of the argument this Court delivered judgment affirming the judgment of GALT, C.J., being of opinion that the case was not distinguishable from *Powell* v. *Peck*, 15 A.R., 138, and *St. John* v. *Rykert*, 10 S.C.R., 270.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l C't.] [Feb. 7.

FLATT *v.* WADDELL. TOWNSEND *v.* WADDELL.

Company—Defective incorporation of—Actions by, dismissed with costs—Liability for costs, of intending corporators and solicitors—Malice—Want of reasonable and probable cause—Liability upon unpaid shares.

Actions brought in the name of a road company against the present plaintiff were dismissed with costs on the ground that the company had never been incorporated according to law. The present actions were brought against four corporators of the company, three of them composing the firm of solicitors who had conducted the former actions on behalf of the supposed company, and all four having expressly authorized the bringing of the former actions, seeking to recover the costs of such former actions, execution therefore against the company having been returned *nulla bona*.

Held, that in the absence of malice and of want of reasonable and probable cause in bringing the former actions, the present actions were not maintainable against the defendants as corporators or as solicitors bringing actions on behalf of plaintiffs who had no legal existence.

It was contended by the plaintiffs before the Divisional Court that the defendants were members of a *de facto* corporation in which they held shares that were not fully paid up, and that recovery could be had against them to the extent of the amounts remaining unpaid upon their shares, but no such case was made upon the pleadings or at the trial.

The Court treated this contention as not having been raised, and reserved leave to the plaintiffs to raise it in fresh actions as they might be advised.

Osler, Q.C., and *F. Fitzgerald* for the plaintiffs.

Bain, Q.C., and *F. Waddell* for the defendants.

Practice.

OSLER, J. A.] [Jan. 14.

MCPHERSON *v.* WILSON.

County Court appeal—Order in chambers striking out jury notice—R.S.O., c. 47, s. 42.

The right or claim mentioned in s. 42 of the County Courts Act, R.S.O., c. 47, is that which forms the subject of the action, not the right to take any particular step in the course of the action; and an order made in Chambers in a County Court action, striking out a jury notice is not an order finally disposing of a right or claim within the meaning of the section, but is in its nature an interlocutory order, and not appealable.

G. W. Marsh for the appellant.

Aylesworth for the respondent.

FALCONBRIDGE, J.] [Jan. 20.

LEESON *v.* LICENSE COMMISSIONERS OF DUFFERIN.

License Commissioners—Liquor License Act—R.S.O., 1887, c. 194, s. 11.

Held, that R.S.O., 1887, c. 194, s. 11, s-s. 13, applies only to the case of the Board of License Commissioners hearing and disposing of formal objections to the granting of a license, and not to every decision of the board having reference to the granting or refusing of licenses.

Bigelow, Q.C., & *Hughson* for the plaintiff.

Delamere, Q.C., & *Myers* for the defendants.

ROSE, J.] Jan. 25.

GRANT *v.* CULBARD.

General Inspection Act—Inspector of Hides—R.S.C., c. 99.

Action against a Government Inspector of leather and raw hides for fraudulently grading and branding incorrect weights and qualities on hides.

R.S.C., c. 99, s. 26, provides that in any such action the defendant may plead the general issue, and that what he did was "done under this Act . . . and if it appears so to have been done, then the judgment shall be for the defendant," etc.

Held, that "done under this Act" means "intended to be done under this Act," and the defendant, not appearing to have acted *mala fide* or to have intended not to perform his duty under the Act, was entitled to the protection of the above section, though he had not pleaded the general issue in terms, inasmuch as he had in effect stated that what he did was done under this Act.

Nesbitt & Ball, for the plaintiff.

Blackstock & Watts for the defendant.

Mr. DALTON.] [Feb. 4.

DENHAM *v.* GOOCH.

Dismissing action—Non-attendance of plaintiff for examination — Unmeritorious action — Security for costs—Former action for same cause by another plaintiff.

Upon a motion to dismiss the action for the plaintiff's non-attendance to be examined for discovery pursuant to appointment, the plaintiff offered to submit herself for examination at any time at her own expense. The Master in Chambers, nevertheless, dismissed the action with costs, the plaintiff's claim not being, in his opinion, an honest or fair one.

The plaintiff sued, as lessee from her brother of certain goods, for damages for illegal distress. An action had b en previously brought by her brother in respect of the same distress against the same defendant, and had been dismissed.

Semble, that under these circumstances security for costs might be ordered.

A. W. Burk for plaintiff.

H. H. Macrae for defendant, Gooch.

Q.B. Div'l C't.] [Feb. 5.

MILLIGAN *v.* SILLS.

Venue—Change of—Preponderance of convenience—County Court action — Appeal from Master in Chambers—Rule 1260 — Appeal to Divisional Court.

Held, by the Divisional Court upon appeal from the decision of ROSE, J., ante p. 90, that the venue was properly changed to Napanee, and that even if an appeal did not lie from the Master in Chambers to a Judge in Chambers under Rule 1260, the latter had the right, as upon a substantive application, to make the order which the Master refused.

As the appeal to the Divisional Court was dismissed upon the merits, no opinion was expressed as to whether such appeal lay.

Hilton for the plaintiff.

Aylesworth for the defendant.

ROSE, J.] [Feb. 5.

MEAD *v.* TOWNSHIP OF ETOBICOKE.

Indemnity— Question between co-defendants— Order directing determination of—Application for, after judgment—Con. Rule 328.

The plaintiff sued a municipal corporation and a railway company for damages ; the corporation in their statement of defence claimed indemnity or relief over against the company, but the company did not answer the pleading, and no order was made or applied for before or at the trial to have the question determined ; judgment was given for the plaintiff against the corporation, but not either in favour of or against the company.

After the judgment had been affirmed by a Divisional Court, the corporation applied to the trial judge for an order under Rule 328 to have the question between them and the company determined.

Quære, whether there was power under the Rules to make the order ; and

Held, that, if there was power, it would not be a wise exercise of discretion to make it ; for new pleadings and a new trial would be necessary, and it would be better that a fresh action should be brought than that the plaintiff should be kept before the Court while the defendants settled their dispute.

McMichael, Q.C., for defendants, Township of Etobicoke.

McCarthy, Q.C., for defendants, G.T.R. Co.

ROBERTSON, J.] [Feb. 8.

RAYMOND *v.* LITTLE.

Masters and referees—Reference under sec. 101 of the Judicature Act—Report—Confirmation —Motion for judgment—Rules 753, 848.

Where the Court at the trial of a partnership action after declaring that a partnership existed and ordering that it be dissolved and wound up, ordered that all other matters in dispute in the action be referred for inquiry and report to a Master, under s. 101 of the Judicature Act,

Held, that the report of the Master under such reference was not subject to the provisions of Rule 848 as to confirmation by filing and lapse of time, but that any time after it was made, a motion for judgment upon it was in order under Rule 753, and upon such motion the Court could adopt it wholly or in part, and any party dissatisfied with it might, before or on the return of the motion for judgment, move to set it aside or vary it.

W. H. Blake for the plaintiff.

Langton for the defendant.

FERGUSON, J.] [Feb. 10.

IN RE MURRAY.

Infants—Service on official guardian—Quieting Titles Act.

In a proceeding by petition under the Quieting Titles Act service on the official guardian is good service upon infants who are required to be notified of the proceedings.

H. D. Gamble for petitioner.

FALCONBRIDGE, J.] [Feb. 18.

PAYNE *v.* NEWBERRY.

Costs—Security for—Motion for judgment under Rule 739—Rule 1251.

Since the passing of Rule 1251, the practice sanctioned by *Doer* v. *Rand*, 10 P.R., 165, and *Anglo-American Casings Co.* v. *Rowlin*, *ib.*, 391, is no longer applicable.

And where a plaintiff against whom a præcipe order for security for costs had been obtained, moved to set it aside, and for judgment under Rule 739, without paying $50 into Court under Rule 1251, his motion was dismissed.

E. Taylour English for plaintiff.

Douglas Armour for defendant.

Q.B.D., Ct.] [Feb. 12.

DANAHER *v.* LITTLE.

Costs—Scale of—Jurisdiction of County Court—Title to land.

The plaintiff, by his statement of claim, alleged that he was and had been for more than six years the owner of certain land, which was unoccupied, and claimed damages for timber cut by the defendant on such land. The defendant, by his statement of defence, disputed the plaintiff's claim, and set up certain facts by way of confession and avoidance. The action was brought in the High Court, but the plaintiff recovered only $120 damages.

Held, that under the pleadings the plaintiff was obliged to prove his title to the land, and therefore the County Court would have had no jurisdiction, and the costs should be on the scale of the High Court.

J. B. Clarke for plaintiff.

Langton for defendant.

FALCONBRIDGE, J.] [Feb. 18.

CENTRAL PRESS ASSOCIATION *v.* AMERICAN PRESS ASSOCIATION.

Discovery—Examination of officer of company—Refusal to attend—Motion to strike out company's defence.

There is no power to strike out the defence of an incorporated company for the refusal of an officer to attend for examination for discovery. *Badgerow* v. *Grand Trunk Railway Co.*, 13 P.R., 132, approved.

McCrimmon for plaintiffs.

C. J. Holman for defendants.

Law Students' Department.

EXAMINATION BEFORE HILARY TERM: 1890.

CERTIFICATE OF FITNESS.

Mercantile Law—Statutes—Practice.

Examiner—R. E. KINGSFORD.

1. A. is agent for B., and as such effects a sale for B. by fraudulent misrepresentation at a high price. A. is subsequently compelled by the purchaser to refund the money. He is then sued by B. to recover the price. How far should he succeed? Why?

2. What is a *Charter Party?* What are its customary stipulations?

3. A. is mortgagee of chattels under a chattel mortgage whereby the mortgage debt is to be

paid on a certain day, and the mortgagor is to hold possession until default? Before default the mortgagor deals fraudulently with the goods. What effect has this proceeding upon A.'s rights? Why?

4. A., a purchaser of goods from C., being unable to pay for them, transfers and delivers them to B. B. verbally promises C. to pay for these goods. C. sued B. for the goods, and B. sets up as a defence that the agreement should be in writing, because it was a promise to answer for the debt of another. How far is the defence good? Why?

5. How far can a surety revoke a continuing guarantee under seal where there is no reservation of such a power in the instrument? Is there any difference in the case of simple contracts of continuing guarantee?

6. Give examples of promises *implied in law.*

7. A. is a creditor of B., and as such holds valuable security. B. pays A. money, and in return therefor A. gives up his security. B. immediately thereafter makes an assignment for the general benefit of creditors. The assignee sues A. for the money paid him by B. What test would be applied to the transaction, and what would be A.'s rights? Why?

8. What statutory provision is there by which an assignee for benefit of creditors can have a claimant who does not furnish particulars of claim barred?

9. On what material can you obtain an order for replevin?

10. When may relief by way of interpleader be granted, and on what point must the applicant satisfy the Court?

Benjamin—Smith.

Examiner—R. E. KINGSFORD.

1. What are the three general grounds of *illegality* of contracts at common law?

2. What is the effect, if any, as regards the Statute of Limitations of a written acknowledgment of a debt containing a promise to pay it upon a certain condition?

3. Goods are sold in Montreal, to be delivered in Toronto. When delivered to the railway company in Montreal, they are in good order, but on the way become unavoidably deteriorated by the conveyance. Must the loss be borne by the vendor or vendee? Why?

4. What is the difference between a *lease* and an *agreement for a lease*, as regards the necessity for a writing?

5. A. sends by mail to B. an offer to sell him goods at a certain price, and the next day he mails a letter revoking the offer. B., after the mailing of the revocation, but before receiving it, mails a letter to A., accepting the offer. Is there any contract? Why?

6. How far does delivery of goods to a carrier go towards constituting an *acceptance* and *receipt* to satisfy the Statute of Frauds?

7. A. sells to B. for $30 a stack of hay standing on A.'s farm. The hay is to remain where it is for three months, and is to be paid for before removal. Before the three months expire, and before removal, or payment, the hay is burnt without the fault of any one. Who bears the loss, and why?

8. Explain briefly the difference between a *condition precedent*, and a *warranty.*

9. Goods which have been sold remain in possession of the vendor. The vendee having made default in payment of the price, the vendor re-sells the goods. Is he liable to an action by the vendee? If so, in what way, and for what amount?

10. A. and B. enter into a written contract by which A. is to serve B. for six months, at $20 per month. In an action by A. for his wages, will B. be permitted to give parol evidence to show that a week after the written contract was made, it was verbally agreed that in consideration of certain privileges to A. he was to receive only $15 per month instead of $20? Give reasons.

Equity.

Examiner—P. H. DRAYTON.

1. Are contracts, entered into with lunatics, void, or voidable only? Explain.

2. What are the provisions of the Act 27 Eliz., c. 4? Are they in any way affected by Provincial Legislation, if so, how?

3. A. believes himself to be the owner of a certain lot in Toronto, and on the faith of such belief proceeds to erect thereon a valuable building; it turns out on an action of ejectment brought by B., that he, B., is the true owner. Can A. obtain any compensation? Reasons for your answer.

4. A. and B. are respectively vendor and purchaser of a certain property. Acting for B. you serve certain requisitions on title on A.'s solicitor, which he says he is not bound to answer, and that the questions raised do not affect the title. What steps should you take to have the matter judicially decided?

5. Under what circumstances will the giving of time by a creditor to the principal debtor discharge a surety, and when not? Explain also the doctrine of contribution between co-sureties.

6. Distinguish between tacking and consolidation, and state how, if in any way, they have been affected by Provincial Legislation.

7. Where a right, title, or interest in lands is in question, what step can a plaintiff take so as to prevent the land being conveyed to an innocent purchaser without notice of plaintiff's claim?

8. State some cases in which the Courts will order an account between partners without a view to the final dissolution of the partnership.

9. What are, and what are not, sufficient acts of part performance of a contract for the sale of lands to take a case out of the operation of the Statute of Frauds? Give reasons for your answer.

10. Define, and illustrate by an example, the *cy-pres* doctrine.

Real Property.

Examiner—P. H. DRAYTON.

1. Is it necessary that the witnesses to a will should sign their names in the presence of each other?

2. In what manner may a trustee invest trust funds where there is no direction in the will to guide him?

3. What is a vendor's lien? In what way may it be defeated?

4. State the four general principles to be observed in the construction of wills.

5. Distinguish between a *marketable* and a *doubtful* title.

6. A., a married man, owns two estates, Blackacre and Whiteacre. Blackacre is sold under an execution. Whiteacre for arrears of taxes. What effect has each sale upon the wife's rights to dower?

7. A writ of *fi. fa.* lands of a vendor is placed in the hands of the sheriff after delivery, but before registration of the deed. Does it bind the lands in the hands of the purchaser? Explain.

8. To what covenants is a purchaser entitled to on a purchase from a trustee?

9. What effect has a registered *lis pendens* upon the title of a purchaser subsequent thereto?

10. To what extent does constructive notice affect a *bona fide* purchaser under the Registry Act of this Province?

CALL.

Harris—Broom—Blackstone.

Examiner—R. E. KINGSFORD.

1. Give an example of *constructive breaking* sufficient to constitute *burglary*.

2. Enumerate the cases in which an officer may lawfully kill a person charged with crime.

3. Explain how far the *animus* is regarded in cases of breach of contract, tort, and crime, respectively.

4. State the main rules for construction of statutes independently of the Interpretation Acts.

5. What facts must be proved to establish a case of slander of title?

6. On a trial of an alleged murderer, how far will evidence be admissible to prove that the prisoner on a former occasion attempted to murder the deceased? Why?

7. What was the common law rule as to the mode of trying accessories? What is the present law?

8. When a prisoner on a criminal trial gives general evidence of good character, how may such evidence be met by the Crown?

9. How far is evidence of *prior convictions* admissible against a prisoner? How is it tendered?

10. What are the different species of bailments? Briefly state the essential feature of each kind.

ERRATUM.—It was, doubtless, with the best intention that the printer altered the words "*minute* characters" to "*immense* characters," at the close of *Law Student's* letter, on page 79 He evidently felt the injustice of the proceeding, and, not realizing the depravity of human nature, thought our classical correspondent had made a mistake.—*Hinc illae lachrymae.*

Law Society of Upper Canada.

HILARY TERM, 1890.

The following gentlemen were called to the bar during the above term, viz. :

February 3rd—Arthur Whyte Anglin, with honours and gold medal ; Charles Eddington Burkholder, with honours and silver medal ; and Robert Elliott Fair, George Smith McCarter, David Hooey, Edmund Sheppard Brown, Duncan Henry Chisholm, Albert Constantineau, William Albert Smith, Walter Allen Skeans, William Edward Fitzgerald, Alfred Edmund Cole, Francis Pedley, William Charles Mikel, Arthur St. George Ellis, Daniel Thos. Kennedy McEwan, Alexander Duncan Dickson, Edward Lindsay Elwood, Albert Edward Baker, Alex. Purdom, Walter Augustus Thrasher, George Harvey Douglas, John Thomas Hewitt, Robert Elliott Lazier.

February 4th—Richard Vercoe Clement.

The following gentlemen were granted Certificates of Fitness as solicitors, viz. :

February 3rd—A. W. Anglin, C. E. Burkholder, J. A. Webster, D. H. Chisholm, A. Purdom, W. A. Skeans, A. E. Baker, A. D. Dickson, G. H. Hutchison, R. S. Chappell, A. S. Ellis.

February 4th :—G. S. McCarter, W. E. Kelly, A. Constantineau, D. Hooey, F. Pedley, H. P. Thomas, H. W. Lawlor.

February 8th :—R. V. Clement, M. C. Biggar, A. E. Cole.

The following gentlemen passed the Second Intermediate Examination, viz. :—R. McKay, F. R. Martin, W. G. Owens, A. H. O'Brien, A. A. Smith, A. J. Anderson, G. B. Wilkinson, J. McEwan, W. P. McMahon, J. H. H. Hoffman, G. D. Grant, A. Bridgman, F. F. Pardee, J. F. Lennox, W. L. McCarthy, W. Mills, A. Crow, D. McKenzie, S. D. Evans, J. G. Farmer, T. W. Scandrett, F. W. Wilson.

The following gentlemen passed the First Intermediate Examination, viz. :—J. C. Cameron, J. S. Robertson, W. B. Taylor, W. L. Wickett, J. R. Milne, P. F. Carscallen, J. E. Varley, E. Harley, H. F. Gault, F. M. Harrison, L. Lafferty, S D. Schultz, G. G. Duncan, A. B. Jones, W. H. Cairns.

The following gentlemen were entered as Students-at-Law, viz. :

Matriculant Class.—Norman Young Poucher, Bertram Halford Ardagh, John Ashworth, Zachary Richard Edmund Lewis.

Junior Class.—John Alexander Stewart, Geo. Wilson Patterson, William Albert Mace, George Edward Deroche, George Hossack Findlay, James Houston Spence, Charles Arthur Batson, John Thos. White, Ralph McDonald Blackley, William Henry Lovering, James O'Brien, Jas. Dickson, Lewis Frederick Clary, Allan Norman Cameron.

Articled Clerks.—Edward J. Going, John Charles Elliott, Ethelbert Fletcher Harrison Cross.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School, Osgoode Hall, Toronto.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein, accompanied by those directions which appear to be the most necessary for the guidance of the Student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.
Lecturers, E. D. ARMOUR. A. H. MARSH, LL.B.
Examiners, R. E. KINGSFORD, LL.B. P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto, are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1890, fourteen Scholarships in all will be offered for competition, seven for those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students.

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School:

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

CURRICULUM.

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Pmith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively. On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

VOL. XXVI. MARCH 17, 1890. No. 5.

A DECISION of the Chancellor in the case of *Spratt* v. *Wilson*, recently tried before him at the Hamilton sittings, is of great importance to trustees or executors to whom moneys are left by will for investment at their discretion. The Chancellor holds that they are bound to invest in such securities as are sanctioned by the Court. The discretion given them does not warrant an investment (as in the case decided) by deposit of funds in a savings bank at three and a half or four per cent.; so that the failure to invest in securities allowed by law makes them liable, however innocent and honest their conduct may be, to pay the legal rate of interest. They are not released, where infants are interested, by the acquiescence in the investment of the statutory guardian of the infants.

IT appears from the decision in the *Central Press Agency* v. *The American Press Association* that the Consolidated Rules do not provide a remedy for the failure of the officer of a foreign corporation, who is liable to be examined, to comply with an order for his examination for discovery. The action was brought for damages for libel published by the defendants of the plaintiffs. In the usual course an order was made for the examination for discovery of the President of the defendant Association at New York, where the Association has its headquarters, and where the President resides. He did not appear for examination, and the plaintiff then moved to strike out the statement of defence. The Master in Chambers dismissed the motion, on the ground that the Consolidated Rules 499, 520 and 648 do not give any power to strike out the defence of a corporation for default of its officer for examination, and that the remedy is against the defaulting officer personally. As the defendant corporation and its officer in this case were resident out of the jurisdiction, the personal remedy was clearly not available. The Master also held that under Rule 3 all former practice which might be applicable has been superseded. An appeal was taken to Falconbridge, J., who dismissed the appeal on the above grounds and affirmed the decision of the Master in Chambers, following *Badgerow* v. *Grand Trunk Ry. Co.*, 13 P. R., 132. The result is that the plaintiffs have to go down to trial without the advantage of examining the opposite party, an advantage of which they are deprived by defect in the Rules. It is true that the plaintiffs might have enforced the attendance of the officer of the defendant Association by letters rogatory to the foreign Court, a tedious and expensive method of obtaining a remedy which ought to be provided by the Rules.

THEORY OF CONTRIBUTORY NEGLIGENCE.

In actions for damages for injury caused by negligence, no defence is more frequent than that the defendant contributed to the accident which caused the injury. The law on this point is considered to be settled by Mr. Davies' donkey, "whose memory is embalmed in the delightful pages of 10 Meeson and Welsby" (Hagarty, C.J.O., in *Follet* v. *Toronto Street Railway Co.*, 15 A.R., p. 347). The decision in *Davies* v. *Mann*, and the limitation with which it must be taken, are discussed in a recent article in the *Harvard Law Review*, which we cite in full, adding some of the principal cases in our own courts:

The importance of the case of *Davies* v. *Mann** consists in this, that it led the way in introducing a principle, now firmly established in England, which was a distinct addition to the theory of contributory negligence. The general result of the cases before *Davies* v. *Mann*, none of them, however, being of commanding importance, except, perhaps, *Butterfield* v. *Forrester*,† is embraced in the proposition, that if the plaintiff was guilty of any negligence contributing to cause the injury complained of, he could not in any circumstances recover.

Davies v. *Mann* was decided in 1842. The facts, substantially as set forth in the reported case, are as follows: The plaintiff, having fettered the fore-feet of an ass belonging to him, turned it into a public highway, where at the time of the injury it was grazing, on the off side of a road about eight yards wide. The defendant's wagon, with a team of three horses, coming down a slight descent at what a witness termed "a smartish pace," ran against the ass and knocked it down, inflicting injuries from which it died soon after. The ass was fettered at the time, and it was proved that the driver of the wagon was some little distance behind the horses.

In addition to other instructions, the Judge of the trial directed the jury that, "if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff." The jury returned a verdict for the plaintiff, and the defendant moved for a new trial on the ground of misdirection.

During the argument in the Court of Exchequer, Parke, B., pointed out that it must be assumed that the ass was lawfully in the highway, as it was so alleged in the declaration, and that allegation was not denied by the defendant. The Court of Exchequer sustained the direction to the jury, and Baron Parke, in his opinion, which is more full than that of Lord Abinger, the other barons delivering no reported opinions, says:—

"This subject was fully considered by this court in the case of *Bridge* v. *The Grand Junction Railway Co.*, where, as it appears to me, the correct rule is laid down concerning negligence; namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence." "The Judge simply told the jury that the mere fact of negligence on

* 10 M. & W. 546. † *Butterfield* v. *Forrester*, 11 East, 60 (1809.)

the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."*

Since the ass was lawfully in the highway, the words "although the ass may have been wrongfully there," in the above passage, must mean negligently there, and the argument of the Court, supposing it to be addressed directly to the defendant, may be stated thus: Granting that the plaintiff was negligent in leaving the ass in the highway, and that his negligence contributed to the injury he now complains of, it was still your duty to travel along the road with due care, so as to avoid accidents; and not having done so, you are liable for the injury resulting.

There is nothing in the facts to show that the defendant's conduct was wilful, and the last clause of the passage quoted has therefore no application to the case. The passage is also open to criticism upon another ground. The argument there suggested is, that if the defendant were not held responsible for running over the ass negligently, he could not be held for running over it purposely or wilfully. But that does not follow; for the law is well settled that if a man purposely or wilfully does damage to another, contributory negligence of the plaintiff is not a defence.† If the act of a defendant sounds in *dolus, culpa* is out of the case.

Bridge v. *Grand Junction Railway Co.*, although referred to by Baron Parke in support of his decision, has not usually been cited as an important case in connection with the rule in *Davies* v. *Mann.* It is chiefly conspicuous for the support it lent to *Thorogood* v. *Bryan*,‡ and was an important authority for consideration in the decisions || overruling that case.

The rule in *Davies* v. *Mann* was received with approval by the English courts, and has been applied in a number of important cases,§ one of which, and the last in which the principle was directly involved, was carried to the House of Lords, where that principle was distinctly affirmed. In one of the intervening

* 10 M. & W. 541.

† 2 Thompson, Negligence, 1160; *Ruter* v. *Foy*, 46 Iowa, 132. ‡ 8 C. B. 115.

|| *The Bernina*, 12 P. D. 58; s. c. *nom. Mills* v. *Armstrong*, 13 App. Cas. 1.

§ *Mayor of Colchester* v. *Brooke*, 7 Q.B. 339 (1845); *Dimes* v. *Petty*, 15 Q.B. 276 (1850); *Dowell* v. *Steam Navigation Co.*, 5 El. & Bl. 195 (1855); *Tuff* v. *Warman*, 2 C.B. N.S. 740 (1857); 5 C.B. N.S. 573 (1858); *Witherly, admxr.*, v. *Regents Canal Co.*, 12 C. B. N.S. 2 (1862); *Springett* v. *Ball*, 4 F. & F. 472 (1865); *Radley* v. *London & Northwestern Ry. Co.*, L. R. 9 Ex. 71 (1874); L. R. 10 Ex 100 (1875); 1 App. Cas. 754 (1876). See also *Spaight* v. *Tedcastle*, 6 App. Cas. 217 (1881); *Cayzer* v. *Carron Company*, 9 App. Cas. 873 (1884).

cases, *Dowell* v. *Steam Navigation Co.*, *Davies* v. *Mann* was explained as a case where the negligence of the plaintiff was not contributory within the meaning of the law of contributory negligence. But in *Radley* v. *London & Northwestern Railway Co.*, Lord Penzance, in moving for judgment and stating the established law of contributory negligence, forever set aside that explanation of *Davies* v. *Mann*. His Lordship said:—

"The law in these cases of negligence is, as was said by the Court of Exchequer Chamber, perfectly well settled and beyond dispute. The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

"But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

"This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies* v. *Mann*, supported in that of *Tuff* v. *Warman*, and other cases, and has been universally applied in cases of this character without question."*

This opinion was assented to by Lord Blackburn and Lord Gordon, and emphatically by Lord Cairns. In the recent case of *The Bernina*, Lord Esher† and Lord Justice Lindley‡ stated the law substantially in the same terms.

The case of *Davies* v. *Mann* being thus approved and established in England, and also in Ireland,‖ is generally stated to be law in the United States;§ but a very brief examination of cases will show that *Davies* v. *Mann*, although cited without criticism by our courts, is generally cited as an authority for the proposition that if the plaintiff is guilty of any negligence contributing directly, or as a proximate cause, to the injury complained of, he cannot recover. The further question, whether the defendant could by the use of due care avoid the consequences of the plaintiff's negligence, is ignored; and *Davies* v. *Mann* is explained as a case where the plaintiff was allowed to recover because his negligence was not contributory.¶

From American text-writers, on the other hand, the case of *Davies* v. *Mann*

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* 1 App. Cas. 758-9; *Nicholls* v. *G. W. Ry. Co.*, 27 U.C.R., 382; *Rastrick* v. *G. W. Ry. Co.*, 27 U.C.R., 396; *Winckler* v. *G. W. Ry. Co.*, 18 U.C.C.P., 250; *Bradley* v. *Brown*, 32 U.C.R., 463; *Anderson* v. *Northern Ry. Co.*, 25 U.C.C.P., 301; *Beckett* v. *G. T. Ry. Co.*, 13 A.R., 174; *Ryan* v. *Canada Southern Ry. Co.*, 10 O.R., 745; *Casey* v. *C. P. Ry.*, 14 O.R., 574; *Blake* v. *C. P. R.*, 17 O.R., 177; *Atkinson* v. *G. T. Ry.*, 17 O.R., 220; *Hutchinson* v. *C. P. Ry.*, 17 O.R., 341; *Jones* v. *G. T. Ry.* 16 A.R., 37; *Crawford* v. *Upper*, 16 A.R., 440; *Weir* v. *C. P. Ry.*, 16 A.R., 100; *St. John* v. *Macdonald*, 15 S.C.R., 1.

† 12 P. D. 61, (5.)

‡ 12 P. D. 89, 3 (*b.*)

‖ *Scott* v. *Dublin & Wicklow Ry. Co.*, Ir. R. 11 C. L. 377.

§ "We know of no court of last resort in which this rule is any longer disputed." Shearman and Redfield, Negligence, (4th ed.), § 99.

¶ *Marble* v. *Ross*, 124 Mass. 44, 48, per Morton, J.

has met with great disapproval. It has been attacked upon various grounds, but principally as being a nullification of the whole doctrine of contributory negligence.

As this case is a qualification upon the general doctrine of contributory negligence, let us first inquire what is the foundation of that doctrine itself. One view, and perhaps the prevailing view, is, to ascribe it to the maxim, *in jure non remota sed proxima causa spectatur.** The plaintiff cannot recover because he is himself the proximate cause of the injury; and conversely, a plaintiff's negligence in order to defeat his action must be a proximate cause. Another view is, that the plaintiff is in the condition of a joint tort-feasor, seeking to recover indemnity for his own wrong. A third view is, that the plaintiff is disentitled because he is himself partly to blame for the injury. This last may not be properly classified as a distinct view or theory of the subject, but rather as another method of stating either or both of the first two views; but it is a form of statement which points to a moral standard as the foundation of the law, and has the sanction of use by a Judge of the highest rank and authority.† Still other views have been advanced, as that the plaintiff falls under the maxim *volenti non fit injuria.* But a series of cases in England under the Employers' Liability Act of 1880 has brought out so clearly the distinction between contributing to an injury by an act or omission, which is or may be contributory negligence, and consenting to it without a negligent act or omission, which is the case intended by the maxim, that further discussion of that view is superfluous.‡

In the light of those theories let us examine *Davies* v. *Mann.* The plaintiff's negligence consists in the act of leaving the donkey fettered in the highway. That is the last act done by him before the accident, and his subsequent intervening conduct has no connection with the case. For the accident which follows, applying the test of moral or personal blame, if he had ordinary intelligence, he is to blame at least in part, and there are strong grounds for holding him as much to blame as the defendant. His want of care and the defendant's want of care are each necessary elements in the result. Remove either, and the mischief would not have happened.

If again, a man guilty of contributory negligence is to be treated as a joint tort-feasor, the plaintiff in *Davies* v. *Mann* is a joint tort-feasor, and is seeking to obtain indemnity for his own wrong. The damage complained of is the result of his negligence and the defendant's negligence conjoined. But this is an inapt and unfortunate form of statement; for a joint tort-feasor the plaintiff cannot be.

* "It [contributory negligence] rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury." *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, 697, per Bowen, L. J. So Pollock, Torts, 374; and Wharton, Negligence, § 133.

† Lord Blackburn, in *Cayzer* v. *Carron Company*, 9 App. Cas. 873, 880, 881.

‡ *Weblin* v. *Ballard*, 17 Q. B. D. 122; *Thomas* v. *Quartermaine*, 17 Q. B. D. 414; 18 Q. B. D. 685; *Yarmouth* v. *France*, 19 Q. B. D. 647; *Thrussel* v. *Handyside*, 20 Q. B. D. 359; *Osborne* v. *London & Northwestern Ry. Co.*, 21 Q. B. D. 220; *Membery* v. *Great Western Ry. Co.*, 14 App. Cas. 179.

He owes no legal duty to himself to take due care of himself or of his property, and as he has violated no legal duty to the defendant and done him no damage, he has committed no tort. Whatever of truth there is in this theory of contributory negligence—the same principle being also sometimes put in the forms that the plaintiff must come into court with clean hands, and that no man can take advantage of his own wrong—is embraced under another principle, not yet mentioned, to be discussed below.

Finally, if a plaintiff cannot recover because his negligence is a proximate cause of the injury, the negligence of the plaintiff in *Davies* v. *Mann* is, in the legal meaning of the phrase, though not perhaps in its logical or metaphysical meaning, a proximate cause. Speaking generally, if a man does or omits to do an act which is likely to result in damage, under all the circumstances known and which ought to be known to him at the time, his act or omission is the legal cause of that damage. Now in *Davies* v. *Mann* the plaintiff did an act which was likely to result in damage, and which did so result. The opinion of the court conceded that it was an act of negligence, and it was contributory negligence; for although not directly conceded by the court to be contributory, that concession is understood by the English courts to be involved in the principle of the case, particularly by the House of Lords, in the passage above quoted from Lord Penzance. If the negligence of Davies was contributory, it was also a proximate cause, for on the theory of proximate causes remote negligence is not contributory, and is not, legally speaking, a cause at all, but is disregarded. *In jure non remota sed proxima causa spectatur.* It follows that in *Davies* v. *Mann* the plaintiff violates every one of the principles thus far given as the foundation of the law of contributory negligence. Yet he is allowed to recover.

It is submitted that there is another principle upon which to rest the law of contributory negligence. When a plaintiff seeks redress in a court of law for a tort, the rule which the court may apply will not only settle the dispute against him or in his favour, but it will have a further and more lasting office as a precedent binding upon all members of the community in a similar case. The community, therefore, has an interest in the result, and the needs of the community should have an influence upon the rule to be laid down. That they do have an influence is beyond dispute.

In an action for negligence it is of no consequence to the law whether the particular defendant shall be compelled to pay damages, or whether the loss shall be allowed to lie where it fell. The really important matter is to adjust the dispute between the parties by a rule of conduct which shall do justice if possible in the particular case, but which shall also be suitable to the needs of the community, and tend to prevent like accidents from happening in future. The reason why a plaintiff who is guilty of contributory negligence can recover no damages is to a large extent a matter of sound policy or legislation; and this view has been suggested at least, if not directly stated, by judicial authority. In the Ohio case of *Davis* v. *Guarnieri*, Owen, C.J., in laying down three considerations upon which the doctrine of contributory negligence is based, gives this as the last: "(3) The policy of making the personal interests of parties dependent

upon their care and prudence."* Why the common law in cases of contributory negligence should not divide the loss is a question to which different answers have been suggested, but which remain a puzzle to Judges of great ability;† just as the opposite rule in Admiralty, which does divide the loss, has perplexed high authorities among the civilians.‡ But the practice being thus established of depriving the plaintiff of all remedy, the ultimate justification of the rule is in reasons of policy, viz., the desire to prevent accidents by inducing each member of the community to act up to the standard of due care set by the law. If he does not, he is deprived of the assistance of the law. How much influence the rule exerts to accomplish the object aimed at cannot be known. That it does exert some influence is sure. A plaintiff who has learned the law of contributory negligence by the hard experience of losing a verdict, is likely to be more careful in the future. From his negligence, at least, accidents will be less likely to happen.

The general doctrine of contributory negligence being thus founded upon considerations of policy, the rule in *Davies* v. *Mann*, which is a part of that doctrine, rests upon the same ground. The plaintiff negligently left the donkey fettered upon the road, and the defendant some time afterward carelessly ran over it. To prevent an injury is a better service than to award compensation for an injury already done; and if it be any part of the policy of the law to prevent accidents, and if it have any means at its command to accomplish the object, the negligence of the defendant in *Davies* v. *Mann* is the negligence at which the law ought to strike. The negligence of the plaintiff having placed the animal in a situation of danger, the defendant had a full opportunity to avoid the peril by due care, which he did not use. The negligence of each is a necessary element, but that of the defendant is nearer to the accident. The plaintiff did an act from which harm was likely to follow; from the defendant's negligence harm was bound to follow.

It may be said that this is merely another way of stating that the negligence of the defendant is the sole proximate cause, and that of the plaintiff remote, and therefore the whole question comes back to the theory of proximate cause. The answer is, that although the negligence of the plaintiff is more remote from the accident than that of the defendant, it is still near enough to be contributory negligence, and is so conceded to be by the House of Lords, and is therefore a proximate cause; and on the theory of contributory negligence which holds that a plaintiff is disentitled to recover whenever his own negligence is a proximate cause of his injury, the plaintiff in *Davies* v. *Mann* ought not to recover. Another suggestion which may be made by the advocate of proximate causes is, that the negligence of the defendant in *Davies* v. *Mann* succeeded that of the plaintiff in time, and that the effect of the case is to decide that where there are several causes, the last cause to operate in point of time is the true proximate cause. The answer is, that the rule in *Davies* v. *Mann* does not inquire whether the

* 45 Ohio St. 471, 489. † Per Lindley, L. J., 12 P. D. 58, 89.

‡ See Marsden, Law of Collisions (2d ed.), 132-134.

defendant was guilty of the last negligence, but only whether he had an opportunity to avoid the accident by the use of due care. If he had, and the plaintiff had not, which was the fact in *Davies* v. *Mann*, he is liable.

Before proceeding to examine more closely the application of the rule in *Davies* v. *Mann* to different conditions of fact, a matter by no means free from difficulty, two other points of a general nature must be noticed.

1. To compel the defendant in *Davies* v. *Mann* to pay the whole damage, when the plaintiff is also at fault, may be said to operate as a punishment upon the defendant. So it may also be said that to deprive the plaintiff of all compensation in other cases of contributory negligence, where the rule in *Davies* v. *Mann* does not apply, and where the negligence of the plaintiff may be only a small element in the accident, operates as a punishment upon him. It may be conceded that there is a punitive element in each of those cases; and if the law of contributory negligence is founded upon considerations of policy, the punitive element can be readily explained and understood.

2. But it may be asked, if the idea of punishment is involved in *Davies* v. *Mann* at all, why does not that admit the doctrine of comparative negligence which prevails in Illinois and several other States? By that rule, "the degrees of negligence must be measured and considered; and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action."* It is perfectly plain that there is no logical connection between the rule in *Davies* v. *Mann* and the doctrine in the passage quoted, which is from the case where comparative negligence first appeared. No comparison of the negligence of the plaintiff and of the defendant is made in *Davies* v. *Mann*. The question is, Can the defendant avoid the consequences of the plaintiff's negligence? If he can, then, although his negligence may be slight in comparison with that of the plaintiff, he is obliged to pay the whole damage.

It remains to apply the rule in *Davies* v. *Mann* to cases with different facts.

1. Suppose the defendant, or the driver, in *Davies* v. *Mann*, instead of being a short distance behind his horses, had stopped by the way in a public house, and allowed the horses to go on ahead, and that when the accident occurred he was a mile behind them, and they were not in sight. What rule is to be applied? Neither plaintiff nor defendant is on the ground at the time of the accident, and the negligence of the defendant consists in allowing the horses to go on alone. His negligence is equally remote from the accident with that of the plaintiff, and although it may be more blameworthy to allow a team of three horses to go alone upon the highway than to leave a donkey fettered there, that cannot affect the result. The rule in *Davies* v. *Mann* requires the defendant to use due care to avoid the consequences of the plaintiff's negligence, but in this case he could not, after the peril was imminent, do anything to avoid the accident. The principle of *Davies* v. *Mann* has therefore no application, and the case falls under the

* *Galena & Chicago Union R. R. Co.* v. *Jacobs*, 20 Ill. 478, 497, per Breese, J. (1858).

general proposition of contributory negligence. The plaintiff's negligence contributes to his injury, and he cannot recover.

In the Pennsylvania case of *Stiles* v. *Geesey*,* the facts were similar to those here supposed, and the plaintiff failed in his action upon the general ground that he was guilty of contributory negligence. The relation of *Davies* v. *Mann* to the case was not considered.

2. Suppose the plaintiff in *Davies* v. *Mann* was himself actually present by the roadside at the time of the accident, and negligently allowed the donkey to remain in the way of the approaching team, the other facts remaining unchanged. In this case, by the use of due care, he could avoid the injury as well as the defendant. It is his duty so to do, and on these facts it is submitted he could not recover. It would be the grossest inequality and injustice to impose upon the defendant the duty of avoiding the consequences of the plaintiff's negligence where he can do so by the use of due care, unless a corresponding duty were imposed upon the plaintiff.

This result also follows as a matter of authority from *Butterfield* v. *Forrester*.† There, the plaintiff, while riding violently through the streets of Derby at nightfall, ran against an obstruction which had been placed across the highway by the defendant, and fell, with his horse. After a verdict for the defendant, Lord Ellenborough, in refusing a rule for a new trial, said: "One person being in fault will not dispense with another's using due care for himself. Two things must concur to support this action: an obstruction in the highway, and no want of ordinary care to avoid it on the part of the plaintiff."‡ In *Butterfield* v. *Forrester*, the defendant was not present at the time and place of the injury, and in that respect the case differs from the one here supposed; but *Butterfield* v. *Forrester* imposes upon the plaintiff the same duty of avoiding the consequences of the defendant's negligence, which in *Davies* v. *Mann* is imposed upon the defendant to avoid the consequences of the plaintiff's; and that duty, if it exists at all, must exist when the opposite party is present as well as when he is absent. *Butterfield* v. *Forrester* has been said to be irreconcilable with *Davies* v. *Mann*;‖ but in answer to that criticism it may be observed that *Butterfield* v. *Forrester* was referred to with approval by Baron Parke in *Bridge* v. *Grand Junction Ry. Co.*, in a passage which he quotes and reaffirms in *Davies* v. *Mann*. Moreover, it is one of the oldest cases in the law of contributory negligence, having been decided in 1809, and has ever since been unquestioned law. So far from being in conflict with *Davies* v. *Mann*, it is the exact converse§ of *Davies* v. *Mann;* and the two cases are to be considered as illustrations of the working of the same great principle—the duty of one person to avoid the consequences of another's negligence—applied to different facts. ¶

*71 Penn St. 439.

† 11 East, 60; *Castor* v. *Uxbridge*, 39 U.C.R., 113. ‡ 11 East, 61.

‖ "The two rules, placed side by side, as some courts are in the habit of placing them, contradict each other and make nonsense." † Thompson, Negligence, 1155.

§ See *The Bernina*, 12 P. D. 58, 62, (8) per Lord Esher; and *id.* 89, 3, (*a*) per Lindley, L. J

* An article reviewing Beach on Contributory Negligence, 2 Law Quarterly Review, 506, presumably from the pen of Sir Frederick Pollock, by adding certain facts in *Radley* v. *London &*

3. Suppose that the plaintiff in *Davies* v. *Mann* was present by the roadside with the donkey, and that half an hour before the accident occurred he had fallen asleep, and was asleep at the time of the accident, the other facts remaining the same. What rule is to be applied? In *Davies* v. *Mann*, Baron Parke puts the case of negligently running over a man lying asleep in the highway, and implies that the injured man could recover. If so, it follows that the duty of the plaintiff to avoid the consequences of the defendant's negligence exists only when the plaintiff has full capacity, after the peril is imminent, to use due care.

4. Again, it may be supposed that the plaintiff in *Davies* v. *Mann* was present at the time of the accident, but so intoxicated that he was incapable of exercising care. What rule is to be applied? This case is like the last in this respect, that the plaintiff in point of fact has no capacity to avoid the accident, any more than if he was not upon the ground. But in this case the incapacity was due to a cause which the law ought to restrain. The general rule undoubtedly is, that if a man is injured while intoxicated, the intoxication alone is not a bar to his action.* But an intoxicated man is in constant danger of inflicting harm

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North Western Ry. Co., presents a case similar, but not identical, with that presented above, by changing the facts in *Davies* v. *Mann*. The Radley case was an action for negligently pushing empty trucks against the plantiff's bridge, whereby it was thrown down, the plantiff or his servants not being at the time on the ground. The additional facts supposed were, that a servant of the plaintiff was on the bridge after it was in imminent peril, but stood by and failed to give the alarm; while the defendant's servants felt the resistance of the bridge soon after the plaintiff's servants saw it in danger, and instead of stopping the trucks to investigate, stupidly passed on. The learned author of the article referred to assumes that the plaintiff could still recover, and sums up the law in this general rule: "The result is, that the party *who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent*, is considered solely responsible for it; and this will be found, we believe, to be true in all such cases, whether the series be long or short." This rule apparently rests upon the theory that contributory negligence is wholly a question of proximate cause, and if the assumption is correct, it follows logically that the person guilty of the last negligence, whether it be an act or an omission, is alone responsible; for his negligence is the sole proximate cause. It also follows logically that wherever the plaintiff's negligence precedes that of the defendant, it is not *contributory* negligence; and that the rules of contributory negligence can apply only where the negligence of the plantiff, is concurrent and simultaneous with that of the defendant. But the cases of *Davies* v. *Mann* and *Radley* v. *London & North Western Ry. Co.* are cases of successive negligence, and are considered by the courts to be cases of contributory negligence also. This shows that the logical theory of proximate causation is not the basis, or at any rate, not the sole basis, of contributory negligence.

In the cases where both plaintiff and defendant have been guilty of negligence contributory to the accident, and both are present at the time of the accident, the true question is believed to be this: Could the accident, after the peril was imminent, be avoided by either party, by the use of due care? If it could, the one who fails to use due care to avoid cannot recover. It cannot be said as matter of law, when both parties are present, that it is negligence on either side not to avoid, or to take precautions to avoid, the consequences of the other's negligence. Thus in *Spaight* v. *Tedcastle*, 6 App. Cas. 217, both parties were present at the time of the accident, and the plaintiff recovered, but on the ground that he, or the pilot in charge of his vessel, was not guilty of any negligence when the peril was imminent. *Washington* v. *Baltimore & Ohio R. R Co.*, 17 W. Va. 190, which presents similar facts, and contains an elaborate review of authorities goes upon the same ground.

* 2 Thompson, Negligence, 1174.

through negligence, and if, while in that state, he receives an injury through negligence of another, which he has no capacity to avoid, why may not the law say, upon grounds of policy, that his incapacity, being due to his own folly, shall be no excuse? Upon authority, however, it must be said that this case has been put several times by Judges, and always with the implication that the plaintiff could recover.* In *Nashville & Chattanooga Railway* v. *Smith*,† plaintiff's intestate was intoxicated and on the track of the defendant at the time of the accident, and the same was the fact in *O'Keefe* v. *Chicago, Rock Island & Pacific R.R.*,‡ and in *Button* v. *Hudson River R.R. Co.*‖ But in each of those cases the result was made to depend upon general questions, the rule in *Davies* v. *Mann*, or the duty or capacity to avoid the accident after the peril is imminent, not being clearly presented or discussed.

5. It is obvious that the last two cases considered may also arise with reference to the defendant. Suppose that in *Davies* v. *Mann* the driver at the time of the accident had been asleep upon his wagon, or so drunk that he was incapable of using due care to avoid the donkey, the other facts remaining the same. The case where the driver is intoxicated has been put by way of illustration from the bench,§ with a strong implication that the plaintiff might recover. There can be little doubt that this is the result which would be reached by the court in a case like the one supposed. But it is submitted that the same rule should be applied to a plaintiff in the like situation; and that wherever one person, present at the place of the accident, is incapacitated, by a cause due to his own fault, from using due care to avoid the consequences of another's negligence, he should be held to the same standard of care as if the incapacity did not exist.

The results of these several cases, and of the discussion thus far, may be summarized thus:

The general rule of contributory negligence, founded largely, if not wholly, upon considerations of public policy, is this: that if a plaintiff has been guilty of any negligence which contributed proximately to the injury, he cannot recover. But it is the duty of both plaintiff and defendant to use due care to avoid the consequences of each other's negligence. If the defendant alone can avoid the

* "If a man is lying drunk on the road, another is not negligently to drive over him. If that happened, the drunkenness would have made the man liable to the injury, but would not have occasioned the injury." Coleridge, J., in *Clayards* v. *Dethick*, 12 Q.B. 439, 445. So Blackburn, J., in *Radley* v. *London & North Western Ry. Co.*, L. R. 10 Ex. 100, 105; Ellsworth, J., in *Isbell* v. *New York & New Haven R. R.*, 27 Conn. 393, 404; *Ridley* v. *Lamb*, 10 U.C.R., 354; *McGunigal* v. *G. T. Ry. Co.*, 33 U.C.R., 194.

† 6 Heisk. 174 ‡ 32 Iowa, 467. ‖ 18 N. Y. 248.

§ "If in *Davies* v. *Mann* the driver of the wagon, if in *Tuff* v. *Warman* the crew of the steamer, had become half an hour before the collision so drunk that their arms were powerless, and if they were still in the same state of drunkenness when the collision occurred, the defendant in each of those cases, according to the argument of the present defendants in support of this exception, must have been exempt from responsibility. Nay, more; if they had been only partially drunk, so as to have retained the voluntary use of their arms, the defendants would be liable; but if they were so thoroughly drunk as to have lost muscular power, the defendants would be exempt from all responsibility, according to rule of instruction for the jury suggested by the thirteenth exception." *Scott* v. *Dublin & Wicklow Ry. Co.*, Ir. R. 11 C. L. 377, 395, per Pigot, C. B.

accident by the use of due care, and does not, the plaintiff may recover. If the plaintiff alone can avoid it, and does not, he cannot recover. If both can avoid it, neither can recover. If neither can avoid it, the general rule applies, and the plaintiff cannot recover.

A few more questions remain to be considered. It has already been said that the principal objection to the rule in *Davies* v. *Mann* is, that it does away with the entire law of contributory negligence. *Davies* v. *Mann*, it is said, decides that the plaintiff can recover damages for an injury sustained by him if the defendant by the use of due care could avoid doing the injury. But a defendant is never liable for negligence except in the case where he could avoid doing the injury by the use of due care. Therefore negligence of a plaintiff is never a bar to his action. The answer is, that the rule of *Davies* v. *Mann* does not apply to every case of contributory negligence, but only to those cases where the defendant is on the ground and by the use of due care can avoid the injury. Outside of that limited class of cases the general rule, embraced in the first proposition of Lord Penzance, has full and unrestricted application.

It has been suggested that the rule in *Davies* v. *Mann* should be modified in the manner following: "Although the plaintiff has negligently exposed himself or his property to an injury, yet if the defendant, *after discovering the exposed situation,* inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages."* In *Davies* v. *Mann* the defendant did not discover the peril before the accident, but he was held bound to use due care independent of the fact of discovery, so that the rule here suggested is a different rule from that in *Davies* v. *Mann*.† If the defendant had discovered the peril and had not used due care to avoid it, that fact would be strong evidence, and in some cases almost conclusive evidence, of wilfulness. And, as has been already stated, if the act of the defendant is wilful, negligence is out of the case. The discovery of a danger, under the rule in *Davies* v. *Mann*, is of no importance except in so far as it tends to prove wilfulness.

Finally, it is urged that the rule in *Davies* v. *Mann* should be discarded, and that there are two other well-established principles "which fix liability upon a defendant in every case where liability can properly be imposed."‡ Those principles are: (1) that remote negligence of the plaintiff is not in law contributory, and (2) that contributory negligence is no defence for a wilful wrong. But if the suggestions here offered are well founded, the rule in *Davies* v. *Mann* has a field of usefulness outside of either of those principles; and it rests upon sufficient grounds.

* 2 Thompson, Negligence, 1157, note 1.

† The rule requiring the defendant to use due care to avoid the consequences of discovered negligence prevails in several States. See *Isabel* v. *Hannibal & St. Joseph R. R.*, 60 Missouri, 475; *Morris* v. *Chicago, Burlington, & Quincy Ry.*, 45 Iowa, 29; *Woods* v. *Jones*, 34 La. Ann 1086.

‡ Sprague, Contributory Negligence and the Burden of Proof, p. 7 (in pamphlet).

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for February comprise 24 Q.B.D., pp. 141-271; 15 P.D., pp. 13-25; 43 Chy.D., pp. 97-186.

TRADE MARK—MERCHANDISE MARKS' ACT—(50 & 51 VICT., C. 28) S. 2, S-SS. 1, 2, S, 3, S-SS. 1, 3—R.S.C., C. 166, S. 6.)—OFFENCE OF SELLING GOODS TO WHICH A FALSE TRADE DESCRIPTION IS APPLIED—INTENT TO DEFRAUD.

Passing by some Parliamentary registration of voters' cases, and a couple of cases on shipping law, which do not seem to call for any notice here, the first case which we think needs attention is *Wood* v. *Burgess*, 24 Q.B.D., 162, which is an interesting decision under the Merchandise Marks' Act. The facts of the case are, that Wood and Burgess were rival manufacturers of mineral waters. Wood, for the purposes of his trade, used glass bottles on which were moulded his name and address. A considerable number of these bottles got into the hands of Burgess, who filled them with mineral water of his own manufacture, and issued them so filled to his customers, having a paper label affixed to each bottle in the following words, "Burgess's Lemon, 215 Brick Lane, Bethnal Green Road." Mr. Burgess was prosecuted under the Act, and the magistrate found, as a fact, that the name, "T. Wood," was a false trade description within the meaning of the Act, and that Wood had not authorized Burgess to use it, but he acquitted Burgess on the ground that he had no intention to defraud. But on appeal to the Divisional Court (Lord Coleridge, C.J., and Mathew, J.), it was held that intent to defraud is not a necessary ingredient of the offence charged.

WEIGHTS AND MEASURES—FALSE WEIGHTS—PROPERTY OF GENERAL POST OFFICE—WEIGHTS AND MEASURES' ACT, 1878—(41 & 42 VICT., C. 49), SS. 25, 29, (R.S.C., C. 104, S. 25).

Regina v. *Justices of Kent*, 24 Q.B.D., 181, was an application to prohibit Justices from entertaining an information under the Weights and Measures' Act, 1878—(R.S.C., c. 104, s. 25) under the following circumstances: The defendant was a postmaster, and on the same premises as the post-office he also carried on the trade of a baker; an information was laid against him for having in his possession, for the purposes of his trade, an unjust scale. The scale in question belonged to the post-office, and was the property of the Crown—and was used solely for the purposes of the post-office. Lord Coleridge, C.J., and Mathew, J., granted the prohibition, holding that the Crown and its property are not subject to the provisions of the statute, and therefore the magistrate had no jurisdiction.

FRIENDLY SOCIETY—ILLEGAL RULES—RESTRAINT OF TRADE.

The principle laid down in *Swaine* v. *Wilson*, 24 Q.B.D, 252, is one which will apply to other cases than those arising under the particular statute in question in that case. That principle is this, that where the general objects of a society are legal, the fact that some of its rules are illegal does not constitute the society an illegal society, or prevent a member of the society from recovering a sum of money payable to him under a rule of the society which is not illegal.

In this case the action was to recover a sum payable by the defendants to the plaintiff, under the rules of a friendly society, of which the defendants were the officials. The defendants resisted payment, on the ground that some of the rules of the society were illegal, as being in restraint of trade and contrary to the provisions of the Trade Union Acts, but the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) held that this furnished no defence. They were, moreover, of opinion that rules made for the *bona fide* purpose of protecting the funds of the society from claims, which might be avoided with reasonable care are not illegal, because they are incidentally to some extent in restraint of trade, provided that their provisions go no further than is reasonable and necessary for that purpose.

SHIP—COLLISION—DAMAGES, MEASURE OF.

The Lincoln, 15 P.D., 15, is a decision of the Court of Appeal on the proper measure of damages in the case of a collision. A steamer collided with a barque, the steamer being alone to blame. The steering compass, charts, log, and log-glass of the barque were lost through the collision. The captain of the barque made for a port of safety, navigating his ship by a compass he found on board. While on her way, and without any negligence, and owing to the loss of the requisites for navigation, the barque grounded and had to be abandoned. The Court of Appeal (Lord Esher, M.R , and Lindley and Lopes, L.JJ.), reversing the decision of Butt, J., held that the grounding of the barque was a natural and reasonable consequence of the collision, and that the owners of the steamer were liable for the damages caused thereby.

WILL—REVOCATION—DESTRUCTION OF WILL WITHOUT TESTATOR'S AUTHORITY—SUBSEQUENT RATIFICATION—WILLS' ACT (1 VICT., C. 26), S. 20, (R.S.O., C. 109, S. 22)—PROBATE OF DESTROYED WILL.

In *Mills* v. *Millward*, 15 P.D., 20, the will of a testatrix was destroyed by a relative, in her presence, but without her authority or consent. Subsequently, though pressed to do so, the testatrix refused to make a new will, saying that she could not bring her mind to it and that it must remain as it was. The question was whether there had been a sufficient revocation of the destroyed will. Butt, J., held there had not, and that there was no sufficient evidence of a subsequent ratification of the destruction of the will so as to constitute it an act done by the direction and authority of the testatrix, and he therefore granted probate of the destoyed will, the contents of which were proved by the affidavit of the executor.

WILL—EXECUTORS ACCORDING TO THE TENOR.

In re Leven, 15 P.D., 22, the will of the testator did not specially appoint any executors, but nominated four persons to act as his trustees, and bequeathed to them his residuary estate. The will contained directions to "my executors" as to the payment of debts and as to the manner they were to deal with the residue and other portions of the estate, and it appeared that the testator had used the

terms "executors" and "trustees" as referring to the same persons. Under these circumstances, Butt, J., held that the trustees were executors according to the tenor, and entitled to probate.

COMPANY—WINDING UP—CREDITOR—ATTACHING CREDITOR IS NOT A CREDITOR OF THE GARNISHEE (R.S.C., c. 129, s. 8).

In re Combined Weighing and Advertising Machine Co., 43 Chy.D., 99, the Court of Appeal (Cotton, Bowen and Fry, L.JJ.), affirming North, J., were of opinion that a person who has obtained a garnishee order absolute, directing a company to pay him the debt due by it to the judgment debtor, does not thereby become a creditor of the company so as to entitle him to present a petition for the winding up of the company, on the failure of the company to comply with the garnishee order. In the opinion of their Lordships, the effect of the garnishee order is not to transfer, or create an equitable assignment of, the debt attached, but merely gives the attaching creditor a lien on it, which he may enforce by execution.

STATUTE OF LIMITATIONS—PRINCIPAL AND SURETY—MORTGAGOR AND MORTGAGEE—COVENANT FOR PAYMENT OF MORTGAGE DEBT—PAYMENT OF INTEREST BY PRINCIPAL (R.S.O., c. 111, s. 23, *Ib.* c. 123, s. 2).

In re Frisby, Allison v. *Frisby*, 43 Chy.D., 106, the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) affirmed a decision of Kay, J. The question being whether a surety who had given a covenant for the payment of a mortgage debt could claim that the debt was barred by the Statute of Limitations, where interest had been paid by the mortgagor up to within twelve years of the commencement of the action, no payment or acknowledgment having ever been made or given by the surety. On the part of the surety it was claimed that the debt was barred, under the Real Property Limitation Act, 1874, s. 8 (R.S.O., c. 111, s. 23), and that under the Mercantile Land Amendment Act, 1856 (see R.S.O., c. 123, s. 2), the payment of interest by the mortgagor could not prevent the statute running as against the surety. The Court of Appeal, without determining conclusively whether s. 8 of the Real Property Limitation Act, 1874, applied, were unanimously agreed that the liability of the surety was kept alive by the payment of interest by the mortgagor. Perhaps the key of the decision may be found in the concluding sentence of the judgment of Fry, L.J., "It is usual for the mortgagor—not the surety—to pay interest, and it would be contrary to good sense and the common understanding of mankind that, while he is doing so, the statute should run in favor of the surety, unless he makes a payment or gives an acknowledgment."

EQUITABLE EXECUTION—APPOINTMENT OF RECEIVER—ABATEMENT—RULES ORD. XVII., R. 1., ORD. XLII., R. 23 (ONT. RULES 620, 886).

In re Shephard, Atkins v. *Shephard*, 43 Chy.D., 131, the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) were called upon to consider the law relating to what is called Equitable Execution, and have judicially explained its nature and legal effect. From this exposition of the law it appears that what is familiarly

called "equitable execution" is not in fact execution, but equitable relief, which is granted because there is a hindrance in the way of execution at law, and it is subject to the ordinary rule that equitable relief can only be granted when the proper parties are before the Court. In this case the judgment creditor applied, shortly before the death of his judgment debtor, for the appointment of a receiver by way of equitable execution; the motion was adjourned, and before it was heard and disposed of, the debtor died, and two days after his death an order was made for the appointment of a receiver, without reviving the action or bringing the representatives of the debtor before the Court. Their Lordships held that under these circumstances the order was ineffectual; and that even assuming that execution can issue at law against the estate of a deceased person without any leave of the Court (as to which Fry, L.J., expressed some doubt), a receiver by way of equitable execution cannot be appointed of a deceased debtor's estate, in the absence of the person on whom the estate has devolved.

COMPANY—NOTICE OF MEETING—CONDITIONAL NOTICE, INVALIDITY OF.

Alexander v. *Simpson*, 43 Chy.D., 139, is an important decision on a point of company law. By the articles of association, it was provided that "seven days, notice in writing, specifying the place, the day, and the hour of meeting, and in case of special business, the general nature of such business, shall be given to the members before every general meeting." Notice was given that an extraordinary general meeting would be held on the 12th July, for the purpose of considering, and if deemed advisable, of passing the resolutions set forth in the notice; and concluded, "should such special resolutions be duly passed, the same will be submitted for confirmation, as special resolutions, to a subsequent extraordinary general meeting which will be held on Monday, the 29th July, at the same time and place." The meeting on the 12th July was held, and the resolutions were adopted, and a newspaper, containing the report, was mailed to the members. On the 29th July a meeting was held, and the resolutions confirmed. This was an action to restrain the carrying out of the resolutions, on the ground that the meeting of the 29th July was not validly called. Chitty, J., held that this objection was well taken, because the notice of the holding of the meeting was conditional on the resolutions being passed at the meeting on the 12th, and, being bad when sent, could not be made good by sending the newspapers containing the report of the meeting on the 12th, because the members were under no obligation to take any notice of the report contained in the newspaper. This view was upheld by the Court of Appeal (Bowen and Fry, L.JJ).

AGREEMENT TO REFER TO ARBITRATION—STAYING PROCEEDINGS—C.L.P. ACT, 1854 (17 & 18 VICT., C. 125) S. 11, (R.S.O., C. 53, S. 38).

Turnock v. *Sartoris*, 43 Chy.D., 150, was an application to stay proceedings under the C.L.P. Act, 1854, s. 11, (R.S.O., c. 53, s. 38), on the ground that the parties had agreed to refer the matters in dispute to arbitration. The plaintiff was lessee under a lease, whereby the lessor (the defendant) covenanted to supply the lessee with water. The lease contained a clause providing that if any

difference should arise between the parties touching the lease or anything therein contained, or the construction thereof, or in any way connected with the lease, or the operation thereof, it should be referred to arbitration. Some years after the date of the lease, disputes having arisen as to the water supply, a written agreement was entered into, binding the lessor to take steps to secure a better water supply, and in some respects varying the rights of the plaintiff as to the supply. The plaintiff brought his action for breach of this agreement, and also alleging that the lessor had not supplied the stipulated quantity of water, and claiming an inquiry as to the damages sustained by the plaintiff "by reason of the matters aforesaid." Under these circumstances, the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.), were of opinion that North, J., had rightly refused to stay proceedings, because the plaintiff was suing for damages for breach of the agreement as well as for breach of the covenant in the lease; and that the arbitration clause only applied to the latter, and therefore the whole subject matter of the action could not be referred, and that it would not be right to split up the action by referring part only of the matters in question; and that even if the arbitration could be construed so as to cover all the matters in respect of which damages were claimed, it would not be proper to refer them to an arbitrator, as he would have no power to determine the construction of the agreement and its effect upon the provisions of the lease. *Wade-Gery* v. *Morrison*, 37 L.T.N.S., 270, was distinguished on the ground that, although there were there two agreements, one of which contained an arbitration clause, and the other did not, they were contemporaneous, and constituted in law but one agreement, and therefore the arbitrative clause applied to both.

INFANT—APPRENTICESHIP DEED—COVENANT OF INFANT TO SERVE—CONTRACT—INJUNCTION TO RESTRAIN BREACH OF NEGATIVE CLAUSE IN CONTRACT BY INFANT.

In *De Francesco* v. *Barnum*, 43 Chy.D., 165, the plaintiff applied for an interim injunction to restrain the defendant, Barnum, and another, from inducing or allowing two infant defendants to perform as dancers, and to restrain the infant defendants from performing as dancers, and the mother, who was also a defendant, from permitting them to perform as dancers, in violation of articles of apprenticeship, whereby the infants were bound to the plaintiff for a term of seven years as pupils, on the terms that he should teach them to dance, and whereby the infants purported to bind themselves not to contract or accept any professional engagement during the term without the plaintiff's consent. The deed also contained mutual covenants by the plaintiff and the mother of the infants, who was also their guardian, whereby the plaintiff agreed to properly instruct the infants, and make certain payments to the mother for dancing engagements during the term, and the mother agreed that the infants' services should be entirely at the plaintiff's disposal during the term, and she was to enter into no professional engagements for the infants during the term without the plaintiff's consent. On the authority of the old case of *Gylbert* v. *Fletcher*, Cro. Car. 179, Chitty, J., decided that, inasmuch as no action could be brought against an infant on a covenant to serve, the negative clause in the apprenticeship deed could not be enforced

by injunction, and he therefore refused the motion as to all the defendants. At p. 172, he says, as regards the case against the infants, "the right to an injunction depends upon the legal right to sue, and if there be no legal right to sue, there can be no right to an injunction. Injunction in cases of this kind to restrain a breach of a negative clause in a contract for service is granted because, first, it is a negative clause; and secondly, because damages are not an adequate remedy, and it is considered right in cases of that kind to interfere directly by preventing a breach, which the person has bound himself not to make. Therefore, as there is no right to sue for damages, there is no right to an injunction." Furthermore, on the balance of convenience he thought it would be improper by an interim injunction to restrain the infants; because by doing so he might be depriving them of their means of support, and for the like reason he declined to restrain the defendant, Barnum, from employing them, and as he refused to restrain the infants or Barnum, he thought it would be idle to grant an injunction against the mother.

SEQUESTRATION—CONTEMPT—NON-PAYMENT OF MONEY BY TRUSTEE PURSUANT TO ORDER—DEATH OF CONTEMNOR—REVIVOR.

In *Pratt* v. *Inman*, 43 Chy.D., 175, Chitty, J., following *Hyde* v. *Greenhill*, 1 Dick, 106, held that where a sequestration had been granted against a trustee, for non-payment of money into Court pursuant to order, and the sequestrators were subsequently authorized to sell certain sequestrated chattels, but before sale the contemnor died, that the sequestration was not determined by the death, but that the proceedings under the sequestration might be continued against the personal representatives of the deceased. In this case the trustee had died insolvent, and a creditor had brought an administration action in which a receiver had been appointed, and the receiver and administrator now applied to restrain the sale under the sequestration proceedings, but Chitty, J., refused the motion, and, by consent of the parties, the application was treated as the hearing of the action, and the action was dismissed with costs.

PARTIES—TRUSTEE REPRESENTING CESTUI QUE TRUST—FORECLOSURE ACTION—RULE ORD. XVI., R. 8, (ONT. RULE, 309).

In *Francis* v. *Harrison*, 43 Chy.D., 183. North, J., determined that in a foreclosure action, brought by a prior mortgagee against a subsequent mortgagee, when the latter is a trustee, and is bankrupt, he does not sufficiently represent his *cestui que trust*, and he declined to give judgment of foreclosure in the absence of the latter. The learned judge even doubted whether the trustee would sufficiently represent the *certui que trust*, even though he were solvent.

COMPROMISE OF ACTION—APPLICATION TO SET ASIDE—JURISDICTION.

In *Emeris* v. *Woodward*, 43 Chy.D., 185, the plaintiff attempted, upon motion, to obtain specific performance of an agreement of compromise, which had been come to in the course of the action, or to have the compromise set aside and be allowed to proceed with the action. This, North, J., was of opinion could not

be done, but that the plaintiff's proper course was to bring a new action. The cases of *Gilbert* v. *Endean*, 9 Chy.D., 259; *Pryer* v. *Gribble*, 10 Chy., 534, seem to show that this is the proper practice; although in *Scully* v. *Dundonald*, 8 Chy.D., 658, a motion to enforce a compromise was entertained. In the Ontario case of *Small* v. *Union Permanent Building Society*, 6 P.R., 206, Spragge, C., allowed a defendant, after a compromise had been agreed to, to put in an answer in the same suit, setting it up and claiming performance of it by way of cross relief, but this decision does not seem to be quite reconcilable with the later English cases.

Notes on Exchanges and Legal Scrap Book.

JOINT TENANCY.—The essentials of a joint tenancy are unity of possession, unity of interest, unity of title, and unity of time of commencement of such title. Therefore, it appears that an attempt to vest the joint tenancy in a corporation and an individual fails, for the reason that the two grantees take in different capacities; the grant to a corporation is a grant to a corporation and its successors; the grant to an individual is a grant to him and his heirs, and those two estates cannot be blended together, as is absolutely necessary in the case of a joint tenancy; further, there cannot be a right of survivorship, which is indispensable to the creation of a joint tenancy (Co.Litt., 190*a*). In an action tried last week (*The Law Guarantee and Trust Society (Lim.)* v. *The Bank of England*) the plaintiff's counsel stigmatised these rules as obsolete and musty. Now, it appears to us that such first principles of the common law should be regarded with the strictest conservatism. They are the real guides to a "level consideration" of the legal aspect of cases, and any attempts to set them aside or disregard them are subversive of precedent and tend to lead to complications in the future, though such may not seem apparent or probable in the present. The judgment of Mr. Justice Mathew in the above case is a forcible exposition of the manner in which the principles of law should be upheld.—*Law Journal.*

THE LATE SIR HENRY MANISTY.—*The Law Journal* in an obituary notice of Mr. Justice Manisty, says: "The history of the life of Justice Manisty has the not very common features that he was in turn solicitor, barrister, and judge. It has been said that he did not come to the bar through the usual avenues. No doubt, at the time when he was called, it was not usual for an attorney or solicitor to be called to the bar, but in these days a solicitor of five years' standing may be called to the bar, without keeping any terms, upon passing the examination for admission to an Inn of Court. Even this slight barrier can be overcome on the certificate of two members of the council of the Incorporated Law Society that he is a fit and proper person to be called to the bar. The reason why Mr. Manisty, who in 1847 had for twelve years prospered as a solicitor, entered his name as a student at Gray's Inn, it is said, was that he wished as a barrister to win a case which he had lost as a solicitor. Three years afterwards he was called to the bar. As a junior he had a large practice in Westminster Hall and on

the Northern Circuit, in the class of cases usually called heavy commercial cases. His acuteness in detecting the real points of his case and his energy in enforcing them, with the store of learning which he had accumulated, brought him success. His fame at this period of his career is commemorated in a song which is still sung on the Northern Circuit, in which all the briefs were said to fall into Manisty's red bag. He rapidly, twelve years afterwards, obtained a silk gown in 1857, and although he did not become the leader of the Northern Circuit, except, perhaps, in the sense that he was senior Queen's Counsel, he held his own on circuit and in Westminster Hall in cases requiring careful treatment of knowledge of the law or a knowledge of the place where to find it, which is almost equally good, and the power of putting the point and driving it home on the bench. It has been said that he had no humour; but there is a tale told of the judge that some time ago he consulted an eminent physician on the state of his health. When questioned as to his diet, he replied that he drank a good part of a bottle of port a day. The physician said, "That will not do; we must knock off that." The judge complied for a fortnight, and came back to say that he was no better and rather worse. The physician suggested that perhaps after all the change of habit had done more harm than good and advised him to return to his usual habit. Whereupon the judge said, "That is all very well; but how about the arrears?" The physician shook his head at this judicial devotion to clearing his list, but it is not impossible that the second prescription helped the judge to do what is the duty of every good judge—"keep down the arrears." The *Law Times* on the same subject, in reply to an article in the *Times*, makes a vigorous defence of those who have entered the profession without taking a University course.

REPORTING—THE MAKING OF HEAD-NOTES.—Judge Seymour D. Thompson has uttered a vigorous malediction in the current *Green Bag* against many minor errors and deficiencies in law reporting. We assent to every one of his criticisms. Especially do we join with the writer in his denunciation of the use of "*ubi supra*," etc. It frequently entails considerable turning back. The Latin form is all that saves it from derision. Suppose the judge or reporter should say "up there." But he has not included the greatest and commonest fault, that is, the construction of the syllabus. There are very few reporters who know how to make a head-note. The English head-notes are generally very poor. In this country there are not above six or eight reporters who know how to do it, and at the head of these we have always put Mr. Chaney, of Michigan, and he never can be surpassed. The radical difficulty with most reporters is that they begin to make the syllabus before they have read the opinion through, and so they build up the syllabus as they go along, by the same process as the judge builds up his opinion, giving every step of the legal reasoning, with all the ifs and buts, all the principles and conclusions of law lying in and around about the point to be desired, and then at the conclusion they give, or attempt to give, the facts and state the point. It is not an exaggeration to say that three-quarters of most head-notes may usefully be struck out or skipped in reading. It is also not an exaggeration to say that many head-notes do not give the slightest hint of what

the case is about. We have in mind one State of whose reports this last assertion is very often true. The head-note ought explicitly or inferentially to disclose whether the action is on a note or for assault and battery or specific performance, but we can show head-notes that give not the faintest glimmering of the subject of the action. Now, the office of the head-note is not to furnish a digest of legal principles, nor a summary of the Judge's reasoning, but a disclosure of the facts and the legal conclusions. In other words, what busy men want when they glance at the head-note is the point, *the point*, THE POINT, and nothing but the point. But it is not always necessary to state the facts, for sometimes a statement of the legal conclusion involves the facts—is pregnant with them, so to speak. As for example: "A mechanics' lien does not attach to railroad rolling stock;" or, "The doctrine of lateral support does not apply as between owners of adjoining gold-mining claims where the process of working is to tear down the soil and wash it;" or, "One servant may maintain an action for an injury negligently inflicted on him by a co-servant." Such statements sufficiently imply the facts, and no useful purpose would be served by adding a long and detailed statement of the particular facts, as was very likely done in the original reports from which we derive these. But sometimes it is shorter and more comprehensible to state the facts, as for example: "A boy eight years old jumped upon the steps of a passenger railway car, and sat upon the platform to steal a ride. The conductor or brakeman kicked him off the car while the train was moving some ten miles an hour, and he was injured. Held, that a recovery against the railway company was warranted;" or, "A pedestrian on a city sidewalk, at night, intentionally turned off the street to take a by-path, and was injured by falling off the projecting end of a culvert. Held, that the city was not liable by reason of not having erected a railing at that point." Sometimes a statement of the facts would be necessarily long, while the conclusion of law is simple, and in such cases the conclusion alone may be given, as for example: "The same degree of care is required of a woman as of a man." It is undoubtedly easier to make a long head-note than a short one, and, beside, it helps fill up the book, but it is not good reporting. Another common fault Judge Thompson does not refer to. That is, repetition. The average reporter puts the whole statement of facts into a head-note, then into a statement proper, and, finally, you get it all sufficiently in the opinion. Some very ingenious gentlemen also put it into the catch-lines. This is no exaggeration; we can point out instances where the catch-lines are a sufficient head-note, even a better one than the professed syllabus. The office of the catch-line is to indicate the subject, not the decision. This repetition is an intolerable fault. There may be intellects so dull that they desire to be told of a thing thrice, but, if so, let them read it thrice in the opinion. This saves space and time at least. If it is necessary or discreet to state the facts substantially in the head-note, it may well be referred to in the preliminary statement, as "The head-note states the facts," —in many cases this is sufficient—or, "The head-note and opinion show the facts." There is no peculiar sacredness in a separate statement of facts, but reporters are such creatures of imitation and habit, and frequently so little sure

of themselves, that they go on repeating like a parrot. *Dicta* should never be put into a head-note. It is bad enough to put them into the opinions. No "semble" or "it seems" for us, if you please. In our multitude of decisions and modern theory of pleadings we have outlived the old-fashioned "scientific" style of reporting, which gave a statement of the pleadings; but there are a few reporters who still cling to it, and are years behind their Courts. We must say here that the worst statements are not infrequently those made by the Judges, who are in the attitude of a witness under cross-examination, who cannot answer a question directly, but must fortify himself as he goes along, lest his counsel shall not take care of him. Their head-notes, too, are never the best. We admire the discretion of the Indiana Judges, who refuse to obey a statute requiring them to make head-notes. One thing more: no Judge should ever interfere with a reporter's head-notes. If he is not sufficient for his office, turn him out and get one who is. But Judges never touch a head-note but to disfigure it, except in a few cases where it is already so bad that human ingenuity cannot make it worse. We say this from personal acquaintance with the proof-reading of Judges. They may tinker their opinions as they please, but they never should touch our head-notes or catch-lines. If they persisted we would discharge them.—*Albany Law Journal.*

LITHOGRAPHED SIGNATURES.—What a vast amount of trouble a few shillings can raise! From the County Court to the Court of Appeal has a solicitor fought for his contention (value 4s.) that his name lithographed on the particulars is sufficient signature to satisfy the County Court Rules. The Master of the Rolls said: "The point seems to me so contemptible that I can hardly bring my mind to consider it." But it turned out that, contemptible as the point was, there was enough consideration left in it to divide the opinion of the Court, and Lord Justice Fry, having stooped to the point, gave an opinion directly contrary to that of Lord Esher. Both judges thought it a subject upon which no two men could differ, and yet they differed. The Master of the Rolls had no doubt that such a form was perfectly good; and he characteristically summed up the opposite contention by saying: "Their argument comes to this, that it is not a signature because it is not a signature." On the other hand, Lord Justice Fry had just as little doubt that as a signature the lithographed form was bad. Unfortunately, Lord Justice Bowen was not present to settle the dispute. After the judgments there arose a doubt, and another diverting disagreement between their lordships, as to the effect of the judgments ot the Courts. If the opinion of the Master of the Rolls, as the senior judge, prevailed, as is the case in the Divisional Courts, then his lordship's judgment would supersede those of no less than three judges of the High Court, including the Lord Chief Justice. Whereas, if Lord Justice Fry's judgment was to be accepted as the result of the appeal, being the same as that in the Divisional Court, his lordship's judgment would override that of a senior Judge in his own Court. Eventually the point was left to be inquired into, which, in the face of the incessant and unyielding difference of opinion throughout the case, sounded like an intimation that their lordships were "going to have it outside."—*Pump Court.*

DIARY FOR MARCH.

1. Sat.....St. David.
2. Sun.....*Second Sunday in Lent.*
3. Mon.....Serfdom abolished in Russia, 1863.
4. Tues ...Court of Appeal Sits. General Sessions and County Court Sittings for trial in York.
5. Wed.....York changed to Toronto, 1834.
9. Sun.....*Third Sunday in Lent.*
10. Mon.....Prince of Wales married, 1863.
13. Thu.....Lord Mansfield born, 1704.
16. Sun.....*Fourth Sunday in Lent.*
17. Mon.....St. Patrick's Day.
18. Tues ...Arch. McLean, 8th C.J. of Q.B., 1862. Princess Louise born, 1848.
23. Sun.....*Fifth Sunday in Lent.*
26. Wed.....Bank of England incorporated 1694.
28. Fri.....Canada ceded to France 1632.
30. Sun.....*Palm Sunday.* B.N.A. Act assented to 1867. Reformation in England began 1534.
31. Mon.....Slave Trade abolished by Britain 1807.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Common Pleas Division.

GALT, C.J.] [Oct. 26, 1889.

DAWSON *v.* SAULT STE. MARIE.

High schools—Incorporated town in judicial district—Right to appoint high school board, and erect school—Necessity of appointment by by-law—Sufficiency of—Proof of ownership of land—Aprropriation of money.

On a motion to continue an injunction to restrain the corporation of S. in the judicial district of Algoma, from paying over to the High School Board of said town, and the said board from receiving the sum of $15,000, raised by by-law of said town for acquiring a site and erecting a high school thereon,

Held, that under the provisions of ss. 4 and 10 of R.S.O., c. 226, taken in connection with s. 1 of 50 Vict., c. 64 (O) incorporating said town, the corporation were authorized to appoint a high school board therefor, and to pass the by-law for the erection of said school; and that the consent of the Lieutenant-Governor, provided by s. 8, was not required, as this was not an additional high school.

Held, also, that the appointment of the board must be by by-law, but a by-law therefor passed after the motion was made but before the hearing thereof was sufficient.

The Court refused to entertain an objection that the board were about to build the schoo on land not acquired by them, for it would not be assumed that the money would be spent until the title to the land had been acquired; and also, it was not necessary to shew that specific portions of the $15,000 had been appropriated to the purchase of the land and the erection of the building.

Shepley for plaintiff.

Masten for defendants, the town of Sault Ste. Marie.

Douglas for defendants, the High School Board.

ARMOUR, C.J.] [Dec. 24, 1889.

MAXWELL *v.* SCARFE.

Creditors' Relief Act—Entry by sheriff of moneys received under execution—Forthwith, meaning of.

Held, that the word "forthwith" contained in s. 4 of the Creditors' Relief Act, R.S.O., c. 65, with reference to the entry of money levied under execution, under the circumstances under which it is used, and to the purposes and provisions of the statute, and abuses which different construction would give rise to, must receive a strict construction and means without any delay; but even if it should receive a free construction and be equivalent to "within a reasonable time," the sheriff did not in this make the entry within such time.

John Crerar for plaintiff.

Heyd for defendant.

ROSE, J.] [Nov. 16, 1889.

CAMERON *v.* CUSACK.

Sale to defeat creditors—Setting aside—Seduction—Exemplification of judgment.

C. knowing that a claim was to be made against him by W. C., for the seduction of his daughter, some six days before the writ issued therefor, arranged with his brother, who was aware of all the facts, to sell out to him his estate, receiving for himself $150, and to apply the balance in payment of his liabilities, but the intention was not to acknowledge or treat W. C.'s claim as a liability. W. C. proceeded with his action and recovered judgment.

Held, that W. C. was a creditor within the meaning of the statute; and the sale having been made with intent to defeat W. C.'s claim, the sale must be set aside.

Barling v. *Bishopp*, 29 Beav., 417, followed. *Ex parte Mercer*, 17 Q.B.D., 290, distinguished.

After the evidence had been taken the learned Judge reserved his decision and permitted written arguments to be put in, in which there was an objection that an exemplification of the judgment in the seduction action was not evidence herein. The daughter was present in Court and could have proved the cause of action. The learned judge was therefore of opinion that the objection was too late, but to prevent the question hereafter arising, leave was given to put in the evidence, the giving of judgment in the meantime suspended.

Glenn for the plaintiff.

Colin Macdougall for the defendant.

STREET, J.] [May 3, 1889.

CAMERON *v.* ROWELL.

Will—Estate—Meaning of real or personal estate—Limitation of action—Express trustee.

The word "estate" used in a will, even when associated with words relating to personal property, is sufficient to pass real estate, unless there is a clear intention from other parts of the will, or from the way the word is used in the particular part of the will, or in some other way it is shewn that it is restricted to personal estate.

J E. D., under the will of his mother, became entitled, on attaining his majority, in 1873, to a legacy of one-half the unexpended estate comprised in the will. In 1877 he assigned all his interest therein, both real and personal, to J. C., and the latter's interest became vested in G. C.

Held, that under the terms of the will the word estate, being entirely applicable to personal estate, and inapplicable to real estate, it only applied to the former; and, therefore, G. C.'s claim, under J. E. D., was limited to the personal estate, and as to this he had no claim either, for as J. E. D.'s legacy was payable in 1873, and it appeared that no payment was then made, nor any acknowledgment since of any right thereto, nor had the fund been set apart for J. E. D. so as to constitute the executor an express trustee for him; the claim was barred by the statute.

Aytoun Finlay for plaintiff,

Beard, Q.C., for defendant.

STREET, J.] Nov. 9, 1889.

BROWN *v.* MCLEAN.

Mortgagee—Paying off prior mortgages and taking mortgage for advance—Neglect of solicitor in searching for execution—Effect of.

The plaintiff advanced the amount necessary to pay off two existing mortgages on certain land, taking a mortgage for his advance, the prior mortgages, at plaintiff's request, being discharged in the statutory form. The defendant, at the time, had a *fi. fa.* lands in the sheriff's hands, of which the plaintiff was ignorant, his solicitor having neglected to search in the sheriff's office.

Held, that the plaintiff was entitled to a declaration that to the extent of the advance to pay off the prior mortgages he was entitled to priority over the defendant's execution, for that the plaintiff advanced his money and had the prior mortgages discharged under the mistaken belief that he was obtaining a first charge, and that he was not disentitled to relief because, by using ordinary care, he might have discovered the mistake, the defendant not being prejudiced thereby.

W. Cassels, Q.C., and *Milligan* for the plaintiff.

Garrow, Q.C., for the defendant.

MACMAHON, J.] [Dec. 14, 1889.

STONEHOUSE *v.* LOVELACE.

Limitation, statute of—Possession, sufficiency of.

Under a verbal agreement made in 1871, between plaintiff and his father, the owner of a farm, the plaintiff was to enter into possession, work, and treat same as his own, the father promising to devise it to him by his will. The plaintiff, in pursuance of the agreement, entered into and continued in possession up to 1884, expending, as he said, a large sum of money in improvements and paying the taxes. The evidence however, shewed that the father never intended relinquishing his title to the land during his lifetime, his actions being such as to indicate that he deemed himself still the owner, namely, by mortgaging it, leasing it, etc., his intention being that the plaintiff should only own it when he received it as a devisee under his will; and the father having by his will devised the land to the plaintiff, the plaintiff accepted thereunder.

Held, that the plaintiff had not held by that, adverse to possession as enabled him to claim that his possession had ripened into a title.

Keffer v. *Keffer*, 27 C.P., 257, distinguished.

Fullerton for the plaintiff.

G. H. Watson for the defendant.

Div'l Ct.] [Nov. 28, 1889.

REGINA *v.* FERRIS.

Canada Temperance Act—Conviction—Costs of conveying to jail.

A conviction for a breach of the second part of the Canada Temperance Act imposed a fine of $100, and directed distress on non-payment of the fine, and in default of sufficient distress, imprisonment in the common jail for two months, unless the fine and costs, including the costs of commitment and conveying to jail, were sooner paid.

Held, there was no power under the Act to include the costs of commitment and conveying to jail, and the conviction was therefore bad and must be quashed. The reasoning in *Regina* v. *Tucker*, 16 O.R., 127, and *Regina* v. *Good*, 17 O.R., 725, followed.

V. Mackenzie, Q.C., for defendant.

T. D. Delamere for the Crown.

Div'l Ct.) [Dec. 12, 1889.

REGINA *v.* FREEMAN.

Criminal law—Selling property by lot or chance—R.S.C, c. 159, s. 2—Conviction, form of—R.S.C., c. 178, s. 87.

S. 2, of R.S.C., c. 159, prohibits the sale of "any lot, card, or ticket, or other means or device for selling or otherwise disposing of any property, real or personal, by lots, tickets, or any mode of chance whatsoever."

The complainant went to the defendant's place of business, and having been told by defendant that on certain spaces on two shelves there were cans of tea containing a gold watch, a diamond ring, $20 in money, he paid $1, and received a can of tea, which, containing an article of small value, he handed the can back, paid an additional fifty cents, and received another can, which also contained an article of small value; he handed this can back also, paid another fifty cents, and received another can, which also contained an article of small value. He then refused to pay any more money, and went away taking the third can and the article in it with him. On a complaint, laid by him before the police magistrate, the defendant was convicted in that he unlawfully did sell certain packages of tea, being the means of disposing of a gold watch, a diamond ring, $20 in money, by mode of chance against the form of the statute, etc.

Held, that the defendant came within the terms of said section 2, so as to be liable to conviction thereunder; and that it was unnecessary to consider the form of the conviction, for under s. 87 of R.S.C., c. 178, no conviction is to be invalid for any irregularity, informality, or insufficiency therein, so long as the Court or Judge is satisfied, as they were here, that an offence of the nature described has been committed, over which the justice had jurisdiction, and that the punishment is not in excess of that which can be legally imposed.

Lount, Q.C., and *Bigelow* for the defendant.

G. W. Badgerow and *Curry* for the Crown.

Div'l Ct.] [Dec. 21, 1889.

PAYNE *v.* MARSHALL.

Gift inter vivos—Sufficiency of.

The defendant, having in her possession a large sum of money which her husband had given her, went with him to the bank to deposit it, and was about to do so when, on a question arising as to the power of withdrawing it in case of the wife's illness, the money, at the bank agent's suggestion, was deposited in both their names, subject to the withdrawal by either of them; and it remained on deposit uninterfered with by the husband at the time of his death, which occurred some months after.

Held, that there was a good gift *inter vivos* to the wife.

G. T. Blackstock for the plaintiff.

Ball, Q.C., for the defendant.

Div'l Ct.] [Dec. 21, 1889.

REGINA *v.* BOYD.

Justice of the Peace—Conviction—Carts used for hire to be licensed under city by-law.

The defendant was convicted for breach of a by-law, passed under s. 436 of R.S.O., c. 184, which provided that no person should, after the passing thereof, without a license therefor, "keep or use for hire any carriage, truck, cart," etc. The defendant was the owner of wagons

and horses which, at the date complained of were employed in hauling coal and gas pipes for the gas company, for which defendant was paid by the hour or day. The defendant also engaged carts and horses which he hired out to haul earth, and which were so being used on the date complained of.

Held, that the defendant came within the terms of the by-law, and was therefore properly convicted thereunder.

W. N. Miller, Q.C., for the defendant.

Mowat for the City of Toronto.

Div'l Ct.] [Dec. 21, 1889.

REGINA *v.* RUNCHY.

Criminal law—Common Pleas Division—Jurisdiction in criminal matters—One or more Judges sitting in absence of others.

The jurisdiction to hear motions for orders in criminal matters vested in the Common Pleas Division of the High Court of Justice for Ontario is the original jurisdiction of the Court of Common Pleas prior to Confederation, and by virtue of s. 5 of C.S.U.C., c. 10, the Court may be holden by any one or more of the Judges thereof in the absence of the others.

On the return of an order *nisi* to quash a conviction, the Court was composed of two of the Judges thereof, the third Judge being absent attending to other pressing judicial work.

Held, that the Court was properly constituted to dispose of the order.

Marsh, Q.C., for the defendant.

Delamere, Q.C., for the Crown.

Div'l Ct.] [Dec. 21, 1889.

DOAN *v.* MICHIGAN CENTRAL RY.

Pleading—Defence of contributory negligence—Not guilty.

In an action against a railway company for damages sustained by the plaintiff, by the death of his father, by reason, as alleged, of the defendant's negligence in omitting to give the necessary warnings of the approach of their train at a railway crossing, the defendants pleaded "not guilty," and referred to the statutes incorporating the company, and to the C.S.C., c. 66, ss. 1 to 83 inclusive, and s. 131.

Held, that the plea was not a compliance with Rule 418; and also, that the defence of contributing negligence could not be set up under t, but must be specially pleaded.

G. T. Blackstock and *Crothers* for the plaintiff.

W. R. Meredith, Q.C., for the defendants.

Div'l Ct.] [Dec. 21, 1889.

REGINA *v.* KING.

Constable—Acting under warrant of commitment—Protection of, when jurisdiction of magistrates over offence, and warrant valid on its face.

A warrant of commitment, issued by two justices of the peace, for non-payment of a fine and costs imposed on J. D., who had been indicted and found guilty of an offence under the Indian Act, directed the constables of the county of B. to take and deliver J. D. to the keeper of the common jail of the county, to be kept there for two months unless the fine and costs imposed, including the costs of conveying to the jail, should be sooner paid.

Held, that the justices having had jurisdiction over the offence, and the warrant being valid on its face, it afforded a complete protection to the constable executing it, notwithstanding that the awarding of the punishment may have been erroneous in directing imprisonment for non-payment of the fine and costs of conveying to jail, as not authorized by the said Act.

V. Mackenzie, Q.C., for the prisoner.

No one appeared for the Crown.

LIPSETT *v.* PERDUE.

Infant—Lease by, for benefit of—Avoidance of—Costs—Order for payment by infant.

An infant cannot, during infancy, avoid a lease made by him, reserving rent for his benefit.

Hartshorn v. *Early*, 19 C.P., 139, and *Stator* v. *Brady*, 14 I.R., C.L.R. 61, 342, followed.

The discretion given by Rule 170, as to costs, authorizes the imposition against the infant of the costs of an action to avoid such lease.

Lash, Q,C., for the plaintiff.

Moss, Q.C., for the defendant.

MACMAHON, J.] [Jan. 2.

WALTON *v.* HENRY.

Injunction—Concealment of fact—Setting aside—Damages—Debt—50 Vict., c. 23, s. 3 (O.)—O.J. Act—Counter-claim.

The defendant having distrained for rent in arrear, the plaintiff claimed that defendant was

indebted to him in damages for breach of the covenants of the lease and obtained *ex parte* an interim injunction restraining proceedings under the distress.

On its being shewn that in the statements made on which the injunction was granted, there was, if not misrepresentation, at least a concealment of an important fact as regards the alleged breach of one of the covenants, the injunction was dissolved with costs.

Semble, the injunction should not have been granted, as the plaintiff had a complete remedy in damages.

Semble, also, that the damages claimed by the plaintiff were not a "debt" within s. 3, of 50 Vict., c. 23 (O.), so as to constitute a set-off against the rent; and, although under the Ontario Judicature Act, they might possibly be the subject of counter-claim, they would not justify an injunction as against a distress levied as here.

The direction that the injunction was dissolved with costs, meant costs payable at the time.

Gordon Hunter for plaintiff.

E. D. Armour for defendant.

Chancery Division.

FERGUSON J.] [Feb. 11.

THE LINCOLN PAPER MILLS *v.* ST. CATHARINES & N. C. R. CO.

Railways and Railway Companies—Default in payment of compensation moneys—Rights of land-owners—Injunction—Order for possession.

Held, that where a Railway Co. had failed to pay the compensation awarded to land owners, in accordance with a judgment obtained for the same, although the Railway Co. had, pursuant to order of the court, entered into possession of the lands, and were operating their railway over them; the land owners were entitled to an order declaring them to have a vendor's lien on the land for the amount, with such provisions as were necessary to realize by means of a sale, but they were not entitled to an injunction restraining the Railway Co. from operating their railway on the lands, nor to an order for the delivery of possession.

McClive for plaintiffs.

Aylesworth for defendants.

Practice.

FALCONBRIDGE J.] [Feb. 28.

ROBB *v.* MURRAY.

Parties—Joint Contractors—Rule 324 (a).

Under an incomplete agreement with the plaintiff, the defendant and one R. went into possession of the plaintiff's shop, intending to carry on business as partners.

The agreement was never completed, the defendant and R. were put out of the shop, and the plaintiff brought this action to recover the amount received by the defendant from sales of goods while in possession of the shop.

The defendant asserted that the contract was a joint one on the part of himself and R., but the plaintiff and R. denied this.

Held, that an order under Rule 324 (a) compelling the plaintiff to add R. as a party defendant, in the character of a joint contractor, was under the circumstances a proper order.

Hoyles, Q.C., for plaintiff.

Shepley, for defendant.

MR. DALTON.] [Feb. 29.

PAYNE *v.* NEWBERRY.

Motion—Renewal of, where refused—Judgment under Rule 739.

Where the plaintiff's motion for judgment, under Rule 739, was dismissed because he had not observed the practice under the Rule 1251, of partly complying with an order upon him for security for costs by paying $50 into Court, and he subsequently paid the money in and renewed the application upon the same material:

Held, that the dismissal of his first application was no bar to the second one.

Semble, it would have been otherwise had the plaintiff failed in his first application by reason of defects in his material, and made a second one upon new material supplying the defects.

E. Taylour English for plaintiff.

Douglas Armour for defendant.

FIRST DIVISION COURT OF THE COUNTY OF CARLETON.

MOSGROVE, JJ.]

CHARLEBOIS *v.* WHITNEY.

Statute of Limitations—Effect of payment as a bar.

In an action in which the benefit of the

Statute of Limitations was claimed by the defendant, but a part payment within the six years was proved, it was contended on behalf of the defendant, following the article which appeared in THE CANADA LAW JOURNAL, Vol. 25, page 322, that under our Ontario Act, R.S.O., c. 123, a payment on account is not sufficient to stop the running of the statute.

Held, apart from the question of the effect of the statute, the effect of part payment as a bar to the Statute of Limitations must be taken as a matter of common law, and the rule that express statutory enactment is required to change the Common Law must apply.

Judgment for the plaintiff accordingly.

G. F. Henderson for plaintiff.

J. W. Ward for defendant.

Law Students' Department.

CALL.

Contracts—Evidence—Statutes.

Examiner—R. E. KINGSFORD.

1. A contract is stated to be void on grounds of "public policy." State the principles which are applied to a contract in order to ascertain whether or not the contract is void on that ground?

2. How far is evidence admissible to shew that the object of an alleged agreement was unlawful?

3. A. and B. are contracting parties. X. is the subject matter of a contract which is supposed by A. to exist, but which in truth does not exist, and is known by B. not to exist. What tests may be applied to this transaction in deciding upon its validity?

4. A. effects an insurance on the life of B. How far do false statements made by B. to the insurance company, concerning his own health, but not known by A. to be false, affect the contract?

5. What are the requisites for a sufficient acknowledgment to take a debt out of the operation of the Statute of Limitations?

6. To what extent, and under what restrictions, is forbearance to sue a good consideration?

7. How far does seven years' absence furnish satisfactory presumption of death?

8. How far are the Judge's notes of a trial evidence of what took place there? Why?

9. In a private action for a public nuisance, what must the plaintiff prove?

10. On a contract of sale state the obligations of the buyer and seller respectively, and state the requisites of proof in an action (1) for not accepting goods; (2) for not delivering goods.

Equity.

Examiner—P. H. DRAYTON.

1. A., who is a broker in Toronto, owns some stock. B., a customer of his, wishes to make an investment. On the faith of A.'s statement, recommending the stock as that of a customer's, he purchases the same. On discovering the true state of affairs he brings an action to set aside the contract. Should he succeed? Reasons for your answer.

2. A., B., and C. are sureties to D., in the sum of $9,000, for the due performance of a contract by E., who fails to carry out his contract. A. is sued by D., and judgment given against him for $9,000. In the meantime C. has died. State A.'s rights as against his co-sureties. Reasons for your answer.

3. A., who is a farmer by occupation, purchases from B. 100 acres of land, which he goes to see personally. The chief inducement to purchase the property is the representat on by B. that there is on it a valuable quarry, which is exposed, the stone of which is suitable for a certain purpose, and therefore valuable; it turns out that the stone is quite unfitted for such purpose, and comparatively of little value. On this state of facts A. seeks to have contract rescinded. Give your opinion, with reasons whether he should succeed, or not.

4. A., a trustee, with funds in his hands for investment, consults with his solicitor as to investing the same. The solicitor states he knows of an investment on a farm of $5,000, and states, as his opinion, that the farm is worth $8,000. The investment is made; the interest is not paid, and, on proceedings being taken to realize, only $4,000 is made. State the position of the trustee, with reasons for your answer.

5. A., the wife of B., brings against him an action for alimony. At what stage of the proceedings can she obtain interim alimony? And how, if in any way, can B. avoid the costs on application for the same?

6. A., who has been for years a confirmed drunkard, enters, when sober, into a contract

with B. for the sale of his farm to him. The price is not a good one, and A.'s friends advise him to bring an action to set the contract aside, which he does, raising, as a reason, that his intellect has become so impaired with drink that he was wanting in contractual power. Should he succeed? Reasons.

7. Distinguish between a mortgage and a pledge of personal property.

8. State fully the rights of a mortgagee to distrain upon the mortgaged premises for arrears of interest as against creditors.

9. A. grants a lease of certain lands to B., he afterwards mortgages them in fee to C. The interest becomes in default, and the property is sold under sale, proceedings of which B. had no notice. What is B.'s position as regards his rights under his lease?

10. Land is by will directed to be sold, and proceeds divided between A. and B. Can A. elect to take his share in land? Reasons.

Real Property.

Examiner—P. H. DRAYTON.

1. A., who is the owner of Blackacre, agrees verbally with B. to sell the same; he writes his solicitor, giving him particulars of the agreement with instructions to carry it out. A. writes B. that the title deeds of his property are at his solicitor's office, where they may be inspected. Nothing more is done. A. subsequently repudiates the contract. Can B. compel him to carry it out?

2. What was the reason and the effect of the statute declaring that corporations should be deemed to be capable of taking and conveying land by deed of bargain and sale?

3. A. dies intestate, leaving real estate, and infant children. B. is appointed administrator. He enters into a contract with a client of yours for the sale to him of a portion of the same. Presuming the title in A. to be good, what formalities would you require to be carried out before accepting the title from the administrator?

4. What recent statutory provision (if any) has been passed touching the husband's interest as tenant by the curtesy?

5. A. registers an agreement by B. to sell him Whiteacre. Owing to outstanding encumbrances, B. is unable to give possession, but on completion claims that A. is bound to pay interest from date of registration of agreement. How far is B. right? Why?

6. A., the owner of a valuable store in Toronto, in the course of negotiations with B. for its sale to him, states that the premises are let to a most desirable tenant, a contract is entered into, but before completion the tenant makes an assignment. B. refuses to carry out the contract, and A. brings an action for specific performance, which B. defends. Who should succeed? and why?

7. Distinguish between the right to vary a written agreement for the sale of lands by parol, and the right to rescind the same by parol.

8. A devise to A., and the heirs of her body, on condition that she marry and have issue male, by B. Construe this?

9. State the general law regulating the position of the signature of a testator in his will.

10. A. dies intestate without lawful descendants, leaving real estate, and leaving a father and mother him surviving. To whom will the inheritance go? Reasons for your answer.

Contracts—Evidence—Statutes.

HONOURS.

Examiner—R. E. KINGSFORD.

1. A. makes an agreement with B., the execution of which would involve an unlawful act on B.'s part. What is the effect?

2. A. assumes to enter into a contract for certain persons who are in existence, but who are incapable of contracting. What is the effect?

3. A. and B. come to an agreement, and one of the terms is that such agreement shall be embodied in a formal contract. The formal contracted is not executed. How far may the agreement be enforced?

4. An agreement is entered into in Michigan between two American citizens with a covenant in restraint of trade unlimited as to space. The party intended to be restrained commences the business in Ontario. How far will our Courts give effect to the covenant? Why?

5. Where a witness refuses to answer a question put to him on the ground that his answer might criminate himself, what are the rules as to his being compelled to answer?

6. What distinction is there between the Statute of Limitations and the Statute of Frauds, as to pleading same respectively as a defence?

7. A., in London, England, sells goods to B., in Toronto. At B.'s request these goods are shipped via Allan line and G.T.R. to Toronto. On arrival in Montreal they are warehoused in the premises of C., who is B.'s agent in Montreal. While there waiting transportation, B. becomes insolvent. A. desires to exert his right of stoppage in transitu. Can he legally do so? Why?

8. What difference is there as to the onus of proving the existence or non-existence of reasonable and probable cause in an action for false imprisonment from that in an action for malicious prosecution?

9. S. covenants under seal, in 1875, with B., for immediate payment of $1,000 on B.'s account. S. dies without paying the amount, and A., the executor of S., leaves S.'s estate, which is in bank stock, unconverted. The bank fails, and A. is sued by B.'s executors (B. having meanwhile also died) in 1887, for the amount of S.'s covenant. Is A. liable? Why?

10. On a conviction for selling liquor without a license, the only evidence given was that the party sold the liquor. The conviction is objected to on the ground that no proof was offered of the want of license. How far should the objection hold good? Why?

Broom—Harris—Blackstone.

HONOURS.

Examiner—R. E. KINGSFORD.

1. A. agrees in writing to enter into B.'s service at a salary payable yearly. A. on leaving B.'s service sues B., alleging a verbal agreement that the salary should be paid quarterly. How far can he legally claim under the last mentioned contract? Why?

2. B., an executor, requests A. to forbear suing him in respect of a debt due by the testator, and promises to pay interest thereon. What would have to be shown to make him liable as executor? Is he liable personally? Why?

3. Explain fully the liability of a Justice of the Peace in a well laid action for false imprisonment.

4. What is the liability of a railway company in the carriage of (1) passengers, (2) freight, (3) luggage?

5. Where the real principal in a contract for the purchase of goods is unknown at the time of contracting, what are the rights and liabilities of that principal when disclosed?

6. When may a vendee return a warranted chattel?

7. How far is the doctrine of estoppel applicable to the acceptor of a bill?

8. What was the common law of treason? How affected by statute?

9. Within what legal limitations have workmen the right to combine in order to determine with their employers the terms only on which they will consent to work for them?

10. To what extent (if any) is there a right of re-hearing a criminal case? What is the procedure?

Real Property.

HONOURS.

Examiner—P. H. DRAYTON.

1. A., a purchaser of a farm, before the time appointed for the completion of contract of sale, went into possession. A. sowed some of the land. He afterwards abandoned the possession entirely, in consequence of objections to the title not being removed. It was contended that he had thereby waived his right to enquiry as to title. Should such contention succeed?

2. A., the owner of Blackacre, mortgages the same. He afterwards marries, and contracts to sell the land to B. He tenders a deed to him without bar of dower, which B. declines to accept, insisting that the wife is bound to join to bar her dower. Is he right in this contention?

3. In searching the title to a property you find a deed executed by a married woman in 1870, but no certificate of examination. Would you be safe in accepting the title? Explain.

4. What is the effect in conditions of sale of the condition that "the vendor will not be bound to produce any documents not in his possession"?

5. A. contracts with B. to sell him a house and lot in Toronto. The property is insured for $5,000, and before completion is burnt. On whom will the loss fall, and what rights, if any, would the insurance company have in respect of the purchase money?

6. A., who is intending to marry B., wrote a paper commencing thus: In the event of a marriage between the undermentioned parties the following conditions as a basis for a marriage settlement are mutually agreed to. The

memorandum was signed by neither party. State the effect of this.

A devise to A. for life, and from and after his decease to B., if he shall have obtained the age of twenty-one years, or as soon as he shall arrive at that age. Construe this.

8. What are the conditions precedent to vendor's right of rescission in a contract for sale of land?

9. Illustrate the principle *falsa demonstratio non nocet.* Distinguish between patent and latent ambiguity in a will as to the reception of evidence, and give examples.

10. A. owns a farm in the township of York. His wife, B., is a lunatic confined in the Toronto asylum. He has contracted to sell the farm free of dower. In what way can he do so?

Equity.

HONOURS.

Examiner—P. H. DRAYTON.

1. An executor receives money which is supposed to be due from a debtor to the estate, and pays it out to creditors. It afterwards turns out that the debt which it was supposed was due to the estate had previously been paid. The supposed debtor brings an action against the executors to recover the money and the executor brings one against the creditors. What are the rights of the parties? Give reasons for your answer.

2. In the event of partial failure of the purposes for which conversion is directed, what distinction is there (if any) with regard to the character in which the object of conversion reverts between the case of conversion directed by deed *inter vivos*? Do you know of any legislation which might be held to affect the doctrine of conversion?

3. A. and B. are respectively first and second mortgagees of Blackacre. A. offers the property for sale under the power of sale in his mortgage. B. buys the property at the sale. The owner of the equity of redemption seeks to redeem. B. defends, claiming an absolute title. Who should succeed in the action? and why?

4. A., who thinks himself dying, hands his watch to B. to give to C. B. does not do so until after A.'s death. Is this a good *donatio mortis causa*? If so, why? If not, why?

5. A. is about to intermarry with a woman, B. He is possessed of a house and lot in Toronto, but at the time of his marriage, owing to difficulties in his business, is on the eve of insolvency. He settles his house and lot on B., who becomes his wife. The creditors, subsequent to his becoming insolvent and making an assignment, seek to have the settlement set aside. Can they succeed? Explain.

6. Illustrate the doctrine of appropriation of payments in the case of a partnership who have a running account with a bank, where one of the partners retires leaving a balance due by the firm to the bank, and the new firm continues dealing with said bank and paying in moneys, but afterwards becomes insolvent.

7. In an advertisement of an intended sale of land in lots, it was stated, "The soil is well adapted for gardening purposes, and a considerable portion of the property is covered with a fine growth of pine and oak which will yield a large quantity of cordwood, and the remainder is covered with an ornamental second growth of various trees." A purchaser at the sale, which took place on the grounds, set up as a defence to a suit for specific performance, that the soil was not such as was represented, that the soil was unfit for gardening purposes, and the trees not as described in the advertisement. Should he succeed in his defence? Explain.

8. A., by his will, devised "all the remainder of my real estate, being my 100 acre farm in the township of York, and my 100 acre farm in the township of Etobicoke" to B. He subsequently purchased several lots in Toronto; will they pass to B.? Explain.

9. A. becomes surety for B., a bank clerk in the employ of a bank in Toronto. B. is subsequently appointed local manager of a branch at Hamilton; he there embezzles some of the bank funds, and the bank seeks to make A. liable therefor. Can it succeed? Explain.

10. The directors of a bank issue a statement of the bank affairs to their shareholders which is in fact garbled, not representing the true state of affairs. A. sees this, and on the faith of it takes shares. What are his rights, supposing he suffers a loss on his shares?

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Latest additions:

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Weir's Quebec Municipal Code, Montreal, 1889.

Appointments to Office.

COUNTY JUDGE.

Elgin.

Charles Oakes Zaccheus Ermatinger, of St. Thomas, Junior Judge of the County Court of the County of Elgin, to be a Local Judge of the High Court of Justice.

POLICE MAGISTRATE.

Simcoe.

William John Frame, of Collingwood, to be Police Magistrate in and for the Town of Collingwood

ASSOCIATE CORONER.

Simcoe.

Charles Marcus Sandford, of Brighton, Docto of Medicine, to be an Associate Coroner with and for the United Counties of Northumberland and Durham.

DIVISION COURT CLERKS

Haldimand

Elgin Birdsall, of Canboro', to be Clerk of the Fifth Division Court of the said County of Haldimand, *vice* Seth K. Smith, resigned.

Middlesex

Robert J. McNamee, of Biddulph, to be Clerk of the Third Division Court of the County of Middlesex, *vice* John Flannigan, left the country

Walter R. Westlake, of Arva, to be Clerk of the Eighth Division Court of the County of Middlesex, *vice* Bamlet E. Sifton, deceased.

Peel.

Samuel Jefferson, of Albion, to be Clerk of the Fourth Division Court of the County of Peel, *vice* F. W. Bolton, deceased

Welland.

William Gearin, of Thorold, to be Clerk of the Fifth Division Court of the County of Welland, *vice* John J. Gearin, deceased.

BAILIFF

Haliburton.

Adam Graham, of Glamorgan, to be Bailiff of the Third Division Court of the Provisional County of Haliburton, *vice* John Dovell, resigned.

Ontario.

James D. Paxton, of Port Perry, to be Bailiff of the Third Division Court of the County of Ontario (re-appointed).

York.

Amos Hughes Wilson, of Newmarket, to be Bailiff of the Fourth Division Court of the County of York.

The Canada Law Journal.

VOL. XXVI. APRIL 1, 1890. No. 6.

THE Court of Appeal closed its March sittings on March 26th, after having disposed of nearly all the cases on the list. We are glad to see that all arrears have been gradually worked off, and that the Court will be in a position to take up new cases at its next sittings on May 13th.

THE Law Society Examinations before Easter Term will take place on the following dates: Law Society Examinations—First intermediate, May 6th; Second intermediate, May 7th; Solicitor, May 13th; Barrister, May 14th. Examinations in Law School—First year, May 5th; Second year, May 9th; Honors and Scholarships, May 10th. The following statutes are prescribed by the lecturers, to be read with the work for the first year in the Law School: With Common Law and Equity—R.S O. (1887), c. 44, ss. 20 to 54. With Contracts—R.S.O. (1887), c. 122, ss. 1 to 12, and c. 123. With Real Property, R.S.O. (1887), c. 100, 102 and 108.

IN *Canada Permanent* v. *Teeter*, lately before the Common Pleas Division Court, the effect of R.S.O. (1887), c. 102, s. 30, was considered. This section provides that no other proceedings shall be taken, without leave obtained from a Judge of the High Court or County Court, after the mortgagee has given notice demanding payment of the mortgage moneys, or any part thereof, or declaring his intention to proceed under the power of sale in his mortgage pursuant to the condition or proviso therein contained, until after lapse of the time mentioned in the said notice. In the above case the mortgage contained a proviso for possession after two months default, and also a power of sale without notice on default for two months. Default having been made for the requisite time, the plaintiffs served the defendant with notice requiring payment forthwith, and also declaring an intention of exercising the power of sale. Before the time mentioned in the notice of sale for exercise of the power had elapsed, the plaintiffs issued a writ against the defendant, who was in possession, to recover possession of the mortgaged premises. At the trial it was contended on behalf of the defendant that the above section of the Mortgage Act applied, and that the plaintiffs could not "take further proceedings upon any clause, covenant or provision contained in the mortgage until after the lapse of the time at or after which the power of sale was to be exercised, unless and

until an order had been obtained from a Judge of the County Court or of the High Court. The plaintiffs relied upon the terms of their mortgage, and submitted that as the notice contained a demand for payment "forthwith," they were not obliged to wait until lapse of the time mentioned for exercising the power of sale; that the section applied only where the demand or notice was made or given "in pursuance of any condition or proviso contained in a mortgage"; that in this case the giving of the notice was a voluntary act, as the mortgage contained a power of sale without notice, referring to *British Canadian L. and I. Company* v. *Rae*, 16 O.R., 15. The trial Judge gave judgment for the plaintiff, holding that on the above facts the said section of the Mortgage Act had no application, and his judgment was sustained on appeal to the Divisional Court.

JUDICIAL SALARIES ELSEWHERE THAN CANADA.

In his message to Congress, the President of the United States recommended an increase in the salaries of the Judges in the following words:—

"The salaries of the Judges of the District Courts are, in my judgment, inadequate. It is quite true that the amount of labour performed by these Judges is very unequal; but as they cannot properly engage in other pursuits to supplement their incomes, the salary should be such in all cases as to provide an independent and comfortable support."

This message has called the attention of the public and profession in the United States to the inadequate salaries paid to all the Federal Judges, and measures are now before Congress to make the salary of the Chief Justice of the Supreme Court $20,500, and the salaries of the Associate Justices $20,000 each; those of the Circuit Courts $9,000, and those of the District Courts from $4,000 to $7,000. A writer in the *American Law Review*, who resides in one of the small-salary paying States, suggests the following schedule of salaries, which he thinks would be a more reasonable one: To the Chief Justice of the Supreme Court $12,500, to the Associate Justices $12,000 each. If a separate Court of Appeal is established in Washington, to the Chief Justice $10,500, and to the Associate Justices $10,000 each. To the Circuit Judges $10,000 each, and to the District Judges from $5,000 to $8,000, according to their locality and judicial work.

The salaries of the Supreme Court Judges were fixed in 1789 at $4,000 for the Chief Justice, and $3,500 for each of the Associate Justices; in 1819 they were increased to $5,000 for the Chief, and $4,000 for the Associates; in 1855 they were again increased to $6,500 and $6,000; and in 1871 to $8,500 and $8,000, respectively. The last increase was in 1873, when they were fixed at $10,500 for the Chief Justice, and $10,000 for the Associate Justices, at which sums they have ever since remained. It may be assumed that a further increase of their judicial salaries will be made this year.

The State Judges do not appear to receive very high salaries, except in the more populous states and cities; their tenure of office is usually short; and they

return to practice with a judicial reputation which gives them a professional standing before the public and at the bar, and assures them a large and remunerative income in their future practice.

The New York State judiciary receive the highest salaries of all the State Judges, the Chief Justice receiving $12,500, the puisne Judges $12,000, and the Judges outside the cities $6,000, and $5 per day for travelling expenses. The New York City Judges, however, surpass their State brethren, and receive higher salaries than the Federal and State Supreme Court Judges. The New York City courts have the following staff: seven Judges at $17,500 ($11,500 paid by the city, and $6,000 by the State), twelve Judges at $15,000, five at $12,000, six at $10,000, fifteen Police Justices at $8,000, and eleven District (Division?) Court Judges at $6,000. The Brooklyn City Judges receive from $10,000 to $11,500. The Philadelphia City Judges receive $7,000; the Pittsburgh and Cincinnati City Judges, $6,000 each.

From this it will be seen that the salaries paid to the Judges who live in the larger cities are higher than in the less populous places, obviously because the incomes of lawyers in such large cities are above the average in other parts of the country, and the cost of living is higher. But as a general rule the Federal Judges are better paid than the State Judges, and have a better tenure of office. They hold their Judgeships for life or during good behaviour, and are allowed to retire from the bench after ten years judicial service, and after reaching the age of seventy years, upon their *full salary*, which is secured to them as a pension as long as they live. Notwithstanding these advantages over the State judiciary, some of the Federal Judges have resigned their offices because of the smallness of the salary. Judge B. R. Curtis, of the Supreme Court, and Judges Dillon, McCrary, and Lowell, of the Circuit Court, have resigned without pensions, each of whom has resumed practice,and realized largely increased professional incomes. Nine other Federal Judges retired on pensions equal to their full salaries.

In England the salaries of the Puisne Justices are equal to the salaries of the Prime Minister and the more important Cabinet officers; while the salaries of the Lord Chancellor, Lords of Appeal, the Lord Chief Justice, and the Master of Rolls, are much higher, and also carry the right to proportionate pensions.

Coming now to the British Colonies (and we must for the present exclude Canada), we find a more just and equitable practice regulating the salaries voted to the colonial judiciary than in the United States. We find, further, that in all the self-governing colonies, except Canada, the salaries of the Prime Minister and his colleagues are lower in amount than the salaries paid to the Judges. Taking those colonies which have the same system of responsible government as is enjoyed by Canada, we find the political and judicial salaries as follows:—

Colony.	Population.	Prime Minister.	Chief Justice.	Puisne Justices.
Victoria	1,104,288	$10,000	$17,500	$15,000
New South Wales	1,042,919	10,000	17,500	13,000
Queensland	387,463	6,500	12,500	10,000
South Australia	318,308	5,000	10,000	8,500
New Zealand	649,349	5,000	8,500	7,500
Tasmania	146,149	5,500	7,500	6,000
Cape Colony	1,428,700	8,750	10,000	$7,500 & $8,750
Natal	481,361	5,000	7,500	$5,000

In colonies not possessing the full powers of responsible government, but which have in most cases an Elective Assembly, the salaries are as follows:

Colony.	Population.	Prime Minister.	Chief Justice.	Puisne Justices.
Jamaica	580,804	$6,500	$10,000	$6,000
Barbadoes	171,860	7,500	5,000	None.
Trinidad	189,566	8,500	9,000	None.
Mauritius	369,302	6,750	8,750	$6,000
Hong Kong	215,800	7,200	12,000	8,160

The salaries of the Judges in India are: Chief Justices, from 60,000 to 72,000 rupees per annum; and Puisne Justices from 40,000 to 45,000 rupees per annum.

By way of digression, it may be remarked that these figures also show that the more important colonies—though having a smaller population and revenue than either Canada or Ontario—pay higher, and it would seem more reasonable, salaries to their Prime Ministers and the other important Cabinet officers than either the Dominion or the Province pays. And as the cost of living in the cities has largely increased since the salaries were last adjusted, it would seem reasonable in the public interest, and in view of that increased cost, to again readjust them, as has, since 1873, been done in all our great banking and commercial institutions.

From the precedents set us by the self-governing colonies given above, we turn, with some feeling of shame, to refer to the much lower salaries paid to the judiciary in Canada. And we find that in Ontario, which is estimated to contain a population of 2,154,786, the salaries of our Judges have been fixed by the Dominion Parliament at sums below those paid by the poorest and least populous of the colonies we have cited. In view of that comparison, we are surprised that our judiciary is as efficient as we believe it to be.

There must of necessity be gradations of salary according to the class of judicial work to be performed. A Judge who has only limited jurisdiction, or who determines questions of practice and procedure in litigations, cannot expect as high remuneration for his judicial services as a Judge who has to administer justice in its highest departments. And the same is true of judicial officers, some of whom have limited functions or jurisdiction, while others have more responsible judicial powers, and determine mixed questions of law and fact in causes *inter partes*.

Where the salaries are insufficient to draw into the judiciary the most talented and the most accomplished and best read legal talent in the profession, then third-rate and down to fifth-rate men will fill them. In that event the whole community suffers, for the public are deprived of the services of those whom they employ in their individual cases, and whom it is best for the public weal should be employed as Judges.

We fear that too often the argument has been advanced by many of our public men—and sometimes by the leaders of public opinion—that it would be an easy matter to fill the judicial or other offices, even if the remuneration were smaller. The argument is true, but it is fraught with dangerous consequences to the public interest and the public service, not foreseen or discounted at their true value by those who use or hear the argument. Undoubtedly men will always be

found who would gladly take offices of trust and responsibility under government, even were the salary lower than it is, and they would take the offices though their mental abilities, professional acquirements, or habits of business would prevent them competing, with any fair degree of success, with other persons in the profession or occupation to which they belong. But such men could bring neither fitness, efficiency, nor dignity to the offices they would seek to fill, while their want of professional or other qualifications or skill would always be an element of weakness and instability to the public service, and might eventually be disastrous to the appointing executive.

These observations are applicable to all branches of the public service where responsibility and ability are required in the execution of public offices and trusts. But to no class of public functionaries do these observations apply with greater force than to our judiciary. Upon their wisdom and learning and trained abilities depend the true interpretation of the laws; upon their integrity and firmness rest the impartiality and certainty of justice; and upon their professional industry and business habits is mainly based the rapid and economical administration of the judicial powers of the Courts. They pass judgment upon the validity or invalidity of the legislative Acts of our Parliament and Legislatures; they decide questions affecting the lives, the personal liberty, and the rights of property, of us all. Their judicial offices, if firmly held and wisely administered, will become the inner citadel of a well-governed community. And that community must be pitied which cannot look with the fullest trust and confidence to its Judges as the faithful and fearless administrators of its justice.

To efficiently discharge the judicial functions and responsibilities we have indicated, requires men to fill our judicial bench whose professional learning and research will make them experts in their knowledge of the law, and whose industry and despatch will not allow their administration of justice to illustrate, by unnecessary or vexatious delays, the maxim that "delayed justice is positive injustice."*

The men we now have on our judicial bench may be fairly said to combine—some in a greater and others in a lesser degree—the qualifications we have indicated, and are fairly and justly entitled to be more liberally and adequately remunerated for their judicial services to the public than they are at present.

It is unfortunately true, as stated in a judgment printed on p. 25 of this volume of THE LAW JOURNAL, that the judiciary which decides most important and weighty questions under our laws receives less than one-half of the compensation paid to some of the solicitors, and to many of the managers, of our commercial corporations.

In France the judicial salaries are not large, but there the number of lawyers is limited by law, and a lawyer having accumulated a reasonable competence from his professional practice will accept the crowning honour of a seat on the judicial

*An old law book says that the King in the judgment of the law is supposed to be present in all his courts when proclamation is made for dispensing justice by the Judges: "Wherefore all men, for all kinds of injuries, may have justice and right—freely without sale, fully without denial and speedily without delay."

bench, and the smallness of the salary will not be a hindrance. But we have not as yet a sufficient number of men of means, as well as fitness, from whom we can expect to fill our judicial offices without paying them an adequate remuneration for the labour and experience those offices demand. And it must be known that a Judge in this country is debarred from many avenues of speculation and financial adventure which are open to all other members of the community. Besides having regard to the character of our institutions, it is not a sound public or national policy to keep judicial salaries at so low a rate that the bench must in time come to be filled either by men who have means, or else by incompetent men who have no means, and who may be prolific in "miscarriages of justice." The position of Judge is one of great responsibility and usefulness, and it is for Parliament and the public to say whether it is wise to pay them so poorly that they cannot discharge the functions of their judicial offices free from pecuniary cares, and perhaps embarrassment.

It has been contended that the judicial salaries in other Provinces should be the same as those in Ontario. If that argument be sound, then it might be urged that the rate of judicial salaries in England or India or Australia should govern us. The true rule for regulating such salaries is the average value of fairly good professional incomes. Where localities practically fix the value of professional incomes, the judicial salaries should be regulated accordingly, taking into account also the question of the cost of living, leaving time and public opinion to work out a fair equalization.

The justice of the claim of our Judges to a better remuneration was, we believe, conceded by the Dominion Government some years ago; and in 1883 the First Minister admitted that "a strong feeling existed in the Province of Ontario that the Judges of the Superior Courts were insufficiently paid," and he further stated that the Government intended to address themselves during the recess to studying the reasons of the pressure that existed in the Province of Ontario and in Montreal, and would come down with some general scheme the next session (Commons Debates, 1883, p. 1,314). We look with hope for the fulfilment of that promise to the Judges and Parliament, and we have every reason to believe that Parliament, if asked, would be found ready and willing to do justice to our hard-worked and ill-paid Judges.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for March comprise 24 Q.B.D., pp. 269-360; 15 P.D., pp. 25-36; 43 Chy.D., pp. 185-315; 15 App. Cas., pp. 1-51.

PRACTICE—INTERPLEADER—GOODS TAKEN IN EXECUTION—ASSIGNEE OF EQUITY OF REDEMPTION IN GOODS.

In *Usher* v. *Martin*, 24 Q.B.D., 272, the point raised was whether the transferee of the equity of redemption in certain goods and chattels, could maintain title to them as against an execution creditor under whose execution they had been seized. It was contended that he could not, under the authority of *Richards* v.

Jenkins, 18 Q.B.D., 451, because it was virtually setting up the *jus tertii* of the mortgagee; but it was held by Mathew and Wills, JJ., that the case was distinguishable from *Richards* v. *Jenkins*, because the claimant had a substantial interest in the goods, viz., all the property in them which was not vested in the mortgagee, whereas in *Richards* v. *Jenkins* the claimant had no title whatever to the goods.

PRACTICE—INTERPLEADER—SHARES—CHOSE IN ACTION—ORD. LVII., R. I. (ONT. RULE 1141).

Robinson v. *Jenkins*, 24 Q.B.D., 275, was an appeal from Lord Coleridge, C.J., and Mathew, J., staying proceedings pending the trial of an interpleader issue, under the following circumstances. The plaintiff, claiming to be the registered proprietor of certain shares in a joint stock company, employed the defendants as brokers to sell the shares for him, and for that purpose delivered to them the certificate of ownership and a transfer of the shares from himself to the defendants. He alleged that he had rescinded the employment, and claimed that the defendants did not return the documents, and the action was brought for a declaration that the plaintiff was entitled to the shares, and to compel the defendants to return the certificate and transfer. The defendants, on the other hand, applied for an interpleader order, on the ground that they claimed no interest in the shares, but that the same were claimed from them by one Bebro, and that they expected to be sued by him for their recovery. The Court of Appeal (Lord Esher, M.R., and Fry, L.J.) were of opinion that the interpleader order had been rightly granted, that although Bebro's claim was to the shares, yet that his claim must be taken to be to everything necessary for their enjoyment, which would include the documents, and they were also of opinion that in any case a *chose in action* is a chattel within the meaning of Rule lvii., r. 1 (Ont. Rule 1141), and therefore the subject of interpleader.

PRACTICE—ATTACHMENT OF DEBTS—DIVIDEND PAYABLE BY OFFICIAL RECEIVER IN BANKRUPTCY—DEBT ATTACHABLE—ORD. V., R. 1, (ONT. RULE 622.)

In *Prout* v. *Gregory*, 24 Q.B.D., 281, a Divisional Court of the Q.B. Division (Lord Coleridge, C.J., and Mathew, J.) determined that a dividend payable by an official receiver in bankruptcy is not a debt which can be attached within Ord. xlv., r. 1 (Ont. Rule 622). We may observe, however, that the Ont. Rule 622 is wider in its terms than the English rule, and permits debts or demands to be attached which could be reached by means of equitable execution. Such a demand as the one in question could no doubt be reached by equitable execution, and therefore in Ontario might be attached.

HABEAS CORPUS—ISSUE OF WRIT AGAINST A PERSON WHO HAS NO LONGER THE CUSTODY OF THE PERSON DETAINED—ILLEGALLY PARTING WITH THE CUSTODY OF INFANT—IMPOSSIBILITY OF OBEYING WRIT.

In the case of the *Queen* v. *Barnardo* (Gossage's case), 24 Q.B.D., 283, the veteran philanthropist, Dr. Barnardo, is again the somewhat unwilling means whereby the Court of Appeal is enabled to throw light on the law of *Habeas Corpus*.

In this case the application was for a writ of *Habeas Corpus*, to compel the doctor to deliver up a child of the name of Gossage, which had been taken into one of his homes with the sanction of its mother. She had been asked to sign an agreement, permitting Dr. Barnardo to place the child in one of the colonies ; but this she did not sign. Without her consent or concurrence, however, he permitted the child to be taken by a person to Canada for adoption, and did not know the address of the person who had taken the child, which had been purposely withheld from him in order to prevent interference by the child's parent. After the child had been thus disposed of, the mother authorized a demand to be made for the child by the authorities of a Roman Catholic institution in order that the child might be taken care of therein, and brought up as a Roman Catholic. With this demand, for the reasons above mentioned, Dr. Barnardo was unable to comply, and thereupon the present application was made for a writ of *Habeas Corpus*. The defendant, who appeared in person, endeavored to distinguish the case from the previous decision in the *Queen* v. *Barnardo*, 23 Q.B.D., 205 (noted *ante* vol. 25, p. 521) on the ground that in that case the writ had actually issued, and the question was whether the return was good, while in the present case the question was whether the writ should issue, and before the writ is issued it is made clear to the Court that the person detained is not in the custody of the defendant, against whom it is sought to issue the writ, and that therefore it ought not to issue, because the writ is not intended to be punitive in its operation. But the Court of Appeal (Lord Esher, M.R., and Fry, L.J.) were unanimously of opinion that the writ had been properly granted, on the ground that the defendant had illegally parted with the custody of the child, and that it would be his duty, if necessary, to go to Canada, and by advertisement or otherwise do his best to recover it, or satisfy the Court that he had done everything "that mortal man could do in the matter," in order to produce the child to the Court, not necessarily to be delivered to the rival institution, but in order that the Court might determine what should be done in the premises in the best interests of the child.

PRACTICE—PAYMENT INTO COURT WITH DEFENCE OF TENDER BEFORE ACTION—COSTS.

In *Griffiths* v. *Ystradyfodwg*, 24 Q.B.D., 307, Wills and Denman, JJ., held that when a defendant, had paid money into Court with a defence of tender before action, the plaintiff could not, on taking the money out of Court, in satisfaction, proceed to tax his costs under Ord. xxii., r. 7, because the defence of tender raised an issue in respect of which the defendants were entitled to go to trial.

EXPROPRIATION OF LANDS—COMPENSATION—OBSTRUCTION OF LIGHTS.

In re Tilbury & Southend Railway Co., and Gower's Walk Schools, 24 Q.B.D., 326, the decision of the Divisional Court, 24 Q.B.D., 40, (noted *ante* p. 75) was affirmed by the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.).

PRACTICE—COMPROMISE OF ACTION—APPLICATION TO SET ASIDE.

In *Emeris* v. *Woodward*, 43 Chy.D., 185, North, J., held that where an agreement for the compromise of an action has been entered into, it cannot be set

aside upon an application in the same action, but that a new action must be brought for that purpose.

PRACTICE—AMENDMENT AT TRIAL—PLEADING JUDGMENT IN FORMER ACTION—ORD. XIX., R. 15, ORD. XXVIII., R. 1, (ONT. RULES 402, 444).

Notwithstanding the wide powers of amendment, at any stage of the proceedings, which the Court possesses, *Edevain* v. *Cohen*, 43 Chy.D., 187, shows that there are cases in which it is the duty of the Court to refuse to exercise them merely to enable a defendant to raise a technical defence. This action was brought against the defendants, Cohen and Cook, for wrongful removal of furniture. At the trial it appeared by the plaintiff's evidence that they had recovered judgment against other persons engaged in the removal. After the evidence for the plaintiff and Cohen had been taken, Cook asked to amend by setting up the judgment, and thereupon Cohen made a similar application. North, J., refused the application, and from this decision Cohen appealed, but the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) agreed that the appeal should be dismissed. Cotton, L.J., said, "I think this amendment is proposed merely to enable the appellant to avail himself of what I may call a technical rule of law, supported by the cases which have been referred to *(i.e., that a judgment against one or more of several tort feasors is a bar to an action against the others for the same cause)* and not in order to determine the real issue which ought to be determined in the action. Further, this objection was not taken and insisted upon at once by Cohen . . . it was first mentioned and the objection was first taken by counsel, who then appeared for another defendant, and it was only raised and insisted on on behalf of Cohen after substantially all the evidence had been taken, and he had taken his chance of the evidence turning out in his favor."

MORTGAGE—SALE BY FIRST MORTGAGEE—MISTAKE IN PARTICULARS—COMPENSATION TO PURCHASER —LIABILITY TO SECOND MORTGAGEE—MEASURE OF DAMAGES.

Tomlin v. *Luce*, 43 Chy.D., 101, is an appeal from the decision of Kekewich, J., 41 Chy.D., 573, noted *ante* vol. 25, p. 489, the propriety of which we ventured to doubt. The Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) were of opinion that the learned judge had erred as to the measure of damages. The case, it may be remembered, was one in which a mortgagee had sold under a power of sale, and, owing to a mistake in the particulars, the purchaser at the sale was awarded compensation. Kekewich, J., held that the mortgagee was accountable to a subsequent mortgagee for the full amount of the purchase money, without any deduction of the sum allowed for compensation; but the Court of Appeal decide that the true measure of liability is the amount which could have been obtained for the property had there been no mistake in the particulars.

PARTNERSHIP—POWER OF PARTNER TO COMPROMISE DEBTS—POWER TO ACCEPT SHARES IN SATISFACTION OF PARTNERSHIP DEBT.

In *Nieman* v. *Nieman*, 43 Chy.D., 198, the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) reversed a decision of Kekewich, J., on a point of partnership law.

The action was brought by one partner against another, to wind up the partnership, which had been dissolved by agreement, and to restrain the defendant from compromising a debt. The defendant having appeared in the action, applied on motion before Kekewich, J., for leave to compromise the debt in question, which was the principal asset. By the intended compromise it was proposed to form a limited company in Amsterdam, to take over the property of the debtors, consisting of certain sugar factories and coffee estates in Java, and to allot to the plaintiff and defendant fully paid-up shares in the company in satisfaction of their debts. The plaintiff objected to this compromise being carried out, but it appearing to Kekewich, J., to be for the benefit of both parties that it should be carried out, he made an order appointing the defendant receiver with liberty to compromise the debt in question as proposed. The Court of Appeal, however, decided that one partner has no implied power to bind his co-partner by accepting shares in a company (though they be fully paid up) in satisfaction of a debt due to the firm; and that the Court has no jurisdiction in an action to wind up a partnership to confer on a receiver any greater powers in this respect than a partner would have. *Weikershem's Case*, L.R., 8 Chy., 831, which is referred to in Lindley on Partnership (5th ed.), 141, was shown to be no authority for the general proposition that such power exists; because the Court there proceeded on the ground that the power existed in that case, because it was shown to be part of the ordinary course of the business of the firm, and there had been express knowledge and assent to the transaction on the part of the partners. It would appear, therefore, from this case that the statement in Lindley, for which Weikersheim's case is cited, is put rather too broadly.

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

MICHAELMAS TERM, 1889.

Resume of the proceedings of Convocation.

Monday, November 18th.

Convocation met.

Present—The Treasurer, and Messrs. Bruce, Foy, Hoskin, Irving, Macdougall, Martin, Meredith, Murray, Osler, and Shepley.

The minutes of last meeting were read and approved.

The petition of the Osgoode Legal and Literary Society, as to the opening of the library at night, was received and read.

Ordered that the petition stand till the Report of the Finance Committee on the reference of the 9th February, 1889, and that the petition be referred to the Library Committee on the questions involved other than financial points.

The Secretary reported the resignation (by letter, which was read) of the telegraph operator, and that a temporary appointment had been made of an operator provided by Mr. Dwight.

The Secretary reported that Miss M. Wynn had applied.

Ordered that the hours of attendance for the operator be 9.30 a.m. to 5.30 p.m., with an hour for dinner, to be fixed by the Secretary, and on Saturdays from 9.30 a.m. to 2 p.m., save on judgment days, when the attendance is to be continued till half an hour after the closing of the courts.

Ordered that the salary of the operator be fixed at $30 per month.

Ordered that Miss Wynn be appointed for three months on trial.

Ordered that Miss Cameron's resignation be accepted at once.

The Report of the Solicitor of the Society was read.

Mr. Irving gave notice of motion for reference to a special committee of the question, whether the hours of business and order and arrangement thereof can be modified so as to ensure greater convenience in the conduct thereof.

Tuesday, November 19th.

Convocation met.

Present—The Treasurer, and Messrs. Bell, Hardy, Irving, Kingsmill, Macdougall, McMichael, Martin, Moss, Purdom, and Shepley.

The minutes of last meeting were read and approved.

Ordered, that the several applications for relief from attendance upon the lectures and examinations of the Law School be referred to the Legal Education Committee, with power to deal with them as they may think, according to the circumstances of each case, to be fair and reasonable, but upon the express understanding that no further applications be entertained by the Committee, save on grounds which may arise hereafter.

The Report of the Legal Education Committee was received and read.

Ordered for immediate consideration and adopted.

Ordered, that leave be given to introduce a rule to carry out said report.

The rule was read a first time, and is as follows:

A primary examination for candidates desiring to enter the Law Society shall be held on the third Tuesday before Hilary Term, 1890, and following days, and the subjects of the examination shall be those comprised in the curriculum heretofore in use, and the rules to the contrary are hereby modified accordingly, but no further primary examinations shall be held.

Ordered, that the rule be read a second time on Saturday, 23rd inst.

The letter of Lieut.-Col. Dawson on the subject of the closing of Osgoode Street, and the letter of the Provincial Secretary on same subject, were read.

Resolved, that the present opinion of Convocation is distinctly opposed to the proposed action, but that Convocation will be very glad to meet the Provincial Secretary on the subject at its meeting on Saturday next.—*Carried.*

The letter of Adam Good complaining of a solicitor was read.

Ordered, that it be referred to the Discipline Committee to enquire whether a *prima facie* case had been made out.

The letters of R. M. Williams were read.

Ordered, that the letters be referred to the Discipline Committee, in connection with the letter of 21st August already referred to the committee.

The letter of W. H. Taylor, State Librarian of Minnesota, was received and read.

Ordered, that Mr. Taylor be informed that the Law Society keeps up a set of the Minnesota Reports, and is not in a position to effect an exchange as proposed.

Mr. Martin's notice was ordered to stand till Saturday next, and Mr. Irving's notice also.

Saturday, November 23rd.

Convocation met.

Present—The Treasurer, and Messrs. Ferguson, Irving, Kingsmill, Lash, McMichael, Moss, Robinson, and Shepley.

The minutes of last meeting were read and approved.

Mr. Moss presented the Report of the Legal Education Committee.

The letter of Mr. Reeve, the Principal of the Law School, on the subject of certain statements in a letter of Mr. Waldron, was presented by Mr. Moss.

Ordered, that the Legal Education Committee be authorized to utilize the large lunch-room for the purpose of the Law School, and also to purchase the necessary seats.

Mr. Moss presented the Report of the Legal Education Committee on the reference to them of petitions in connection with exemptions from attendance at the Law School.

The report was received, read, ordered for immediate consideration, and adopted.

The Report of the Special Committee on the new building in connection with the Law School was received and read.

Ordered for immediate consideration and adopted.

Ordered, that the Order-in-Council authorizing the erection of the building be entered on the minutes, and the same is as follows:

Order-in-Council, approved by His Honour the Lieutenant-Governor, dated the 8th day of November, 1889.

Upon the recommendation of the Hon. the Commissioner of Public Works, the Committee of Council advise, that the erection by the Law Society on the Osgoode Hall premises, on the site of the old boiler house, of a building for the accommodation of the students attending the Law School, etc., be approved of, such building to be erected in accordance with the plans submitted to the Commissioner. Certified,

LONSDALE CAPREOL,
Assistant Clerk, Executive Council, Ontario.

The letter of the Provincial Secretary on the closing of Osgoode Street was received and read.

Mr. Irving moved the second reading of the rule as to primary examinations. —*Carried.*

The rule was then read a third time and passed.

Ordered, that Mr. Martin's notice as to Law School Rule do stand till next meeting.

Ordered, that it be referred to a Select Committee, composed of the Treasurer and Messrs. Moss, Irving, Shepley, Martin, and Robinson, to consider and report on the question whether and how the hours of business and the order and

arrangement thereof can be modified so as to secure greater convenience in the conduct thereof.

Ordered, that certain Benchers having applied for the use of the dining room for the evening of the 7th December, the application be granted.

Friday, November 29th.

Convocation met.

Present—The Treasurer, and Messrs. Bell, Cameron, Ferguson, Foy, Irving, Kingsmill, McCarthy, McMichael, Mackelcan, Meredith, Morris, Moss, Murray, Osler, Robinson, Shepley, and Smith.

The minutes of last meeting were read and approved.

Mr. Hoskin presented the Report of the Discipline Committee on the petition of R. M. Williams; reporting that a *prima facie* case had been made for enquiry.

The report was received, read, ordered for immediate consideration, and adopted.

Mr. Hoskin moved that the matter of the petition be referred to the Committee, for investigation in the usual way.

Ordered accordingly.

Mr. Osler, from the Reporting Committee, reported the letter of the editor on the state of the Reports, which was received and read.

Mr. Irving, from the Library Committee, presented a report on the petition of the Osgoode Legal and Literary Society, referred to it, which was received and read.

Mr. Murray, from the Finance Committee, reported that the cost of carrying out the report of the Library Committee would not exceed two dollars per night.

Ordered that the library be opened for the use of those who are entitled to use it between the hours of 7.30 and 10.30 p.m. (except during vacations), under such regulations as the Library Committee may prescribe. That this arrangement be made as a renewed experiment, and that with a view to the ascertainment of the results a record be kept of the attendance. That the Library Committee have power to provide for the closing of the library on any special occasion.

The letter of H. R. Hardy, as to a grant for the legal chart, was read.

Ordered, that a grant of $100 be made on the same terms as last year.

The letters of Mr. Carroll, acccompanied by communications from Messrs. Beaumont and Ross, charging Mr. P. Heaslip with practising in the Surrogate Court, and complaining thereof, was received and read.

Ordered, that the question be referred for enquiry and report to a select committee, composed of Messrs. Meredith, Mackelcan, Lash, and McCarthy.

The letter of Lieut.-Col. Dawson, and others, on the closing of Osgoode Street, was received and read.

Ordered, that a select committee be appointed to confer with the Provincial Secretary as to the proposed concession, and after such conference to report their opinion as to what should be done, and that the said committee be composed of Messrs. Murray, Kingsmill, Foy, Mackelcan, and Ferguson.

Saturday, December 7th.

Convocation met.

Present—The Treasurer and Messrs. Bruce, Fraser, Irving, Kingsmill, Martin, Moss, Murray, Osler, Purdom, and Smith.

The minutes of last meeting were read and approved.

Mr. Moss presented the Report of the Legal Education Committee.

The report was received, read, ordered for immediate consideration, and adopted.

Mr. Osler presented the Report of the Reporting Committee on the subject of the new digest.

The Report was read, received, and ordered for immediate consideration.

Ordered, that the proposed digest shall not include the appendix to Robinson & Joseph's Digest.

Ordered, that the Committee be requested to present a further report on the points discussed at the next meeting, and that further consideration of the matter be deferred till then.

Mr. Martin's notice,as to Law School, was ordered to stand till next meeting.

The letter of Mr. C. Durand was received and read.

The letter of Mr. G. S. Holmested, as to water rates for ground used by Tennis Club, was read.

Ordered that the amount paid by the club for this and last year be refunded, but that they be notified that no further payment of water rates will be made by Convocation.

HALF YEARLY MEETING.

Tuesday, December 31st.

Convocation met.

Present—Sir Adam Wilson and Messrs. Ferguson, Foy, Hoskin, Irving, Kingsmill, McCarthy, McMichael, Martin, Moss, Murray, Osler, Robinson, Shepley, and Smith.

In the absence of the Treasurer, Mr. Irving was appointed chairman.

The minutes of last meeting were read and approved.

The Secretary read a letter from the Registrar of the University of Toronto, dated 19th September, 1889, to remind Convocation that the Society is entitled to appoint one representative to the Senate of the University, and that the term of the former representative had expired.

Ordered, that Mr. Moss, Q.C., be re-appointed a member of the Senate of the University of Toronto.

Mr. Hoskin, from the Discipline Committee, reported that they had considered the complaint of Mr. Keefer against a solicitor, and are of opinion tha a *prima facie* case has not been shown, and that there is no necessity for any investigation.

The report was adopted.

Mr. Hoskin drew the attention of Convocation to the fact that Mr. George Macgregor Gardner had given notice of an application to the Legislature for an Act to authorize his admission as a barrister and solicitor.

Ordered, that Mr. Irving and Mr. Hoskin do appear at the proper time, and oppose such application.

Mr. Hoskin drew the attention of Convocation to a Certificate of 6th December, 1889, issued by the Registrar of the Chancery Division, H.C.J., relating to Mr. J. P. MacMillan.

Ordered, that the chairman of the Discipline Committee do ascertain if the order can be amended so as to comply with Rule 119 of the Society, and if amendable, that he ask that it be amended.

Mr. Shepley drew the attention of the Benchers to a memorandum of Convocation of 15th February, 1889, relating to the accommodation to be afforded for the robing of practitioners.

Mr. Osler presented the Report of the Reporting Committee.

The report was received, read, considered and adopted.

Mr. Martin moved pursuant to notice certain Rules set out hereafter.

The Rules were read a first time.

Ordered, that they be printed, distributed to Benchers, and come up for a second reading on the first Tuesday of Hilary Term, 1890.

Mr. Shepley gave the following notice:

That at the first meeting of Convocation in Hilary Term next, he will move that the Finance Committee be requested to report to Convocation upon the direction given that committee 15th February, 1889, to enquire and report whether further accommodation can be provided in Osgoode Hall for the clothing of practitioners in attendance at the hall, and to report what, if any, difficulties exist in the way of making such provision.

Convocation adjourned.

(Sd.) J. K. KERR, *Chairman Journals Committee.*

Correspondence.

WHO MAY SOLEMNIZE MARRIAGE?

To the Editor of THE CANADA LAW JOURNAL.

Since the appearance, by your kind indulgence, in the C.L.J. of the 1st February, of my letter on the Lawless-Chamberlain marriage, I have found an additional argument in favor of my contention that marriages by superannuated clergymen and ministers, of all denominations, are voidable. The interest aroused by my first letter justifies, I think, the production of this the second.

The Revised Statutes of Ontario, 1887, chap. 40, section 7 (descended from 10, 11 Victoria chap. 14, section 16), reads:—"7. Every clergyman, teacher, minister or other person authorized by law to baptise, marry, or perform the funeral service in Ontario, shall keep a registry showing the persons whom he has baptised, or married or have died *within his cure and belonging to his congregation.*" The italics are mine. Surely no uninterested, reasonable and law-abiding person will support the claims of these superannuated clerics,—*who are without cure or congregation,*—and admit that they have authority under the law to solemnize marriage.

We cannot understand why superannuated ministers should even claim, much less be allowed, the privilege of doing ministerial work, or—what is sweeter to them—the privilege of exacting fees for such work. Can a Barrister practise his profession if not on the Roll of the Law Society? Can a member of Parliament expect to retain the franking privilege when he has been elected to stay at home? Can a retired military or naval officer, on his own motion, put on his uniform, attend the parade of a military force, and insist on exacting obedience from those whose rank was inferior to that he retired from, and then charge for his day's service?

To put an end to the operations of these ordained Canadian Gretna Green blacksmiths, I would respectfully suggest that registers be kept for each church or congregation or religious community in Ontario; that duplicate registers be kept in the nearest Court House, Town Hall or Post Office or Bank, as thought safest and best; and that the person who keeps the original register, or has charge of the same, shall keep the duplicate copy duly and regularly posted.

R. J. W.

Notes on Exchanges and Legal Scrap Book.

THE REJECTION OF HEARSAY EVIDENCE.

It may well be doubted if the extremely artificial rules of the admissibility of testimony before judicial tribunals have been productive of anything but harm. Had they never existed, a vast amount of learned case law built on unstable foundations, and much of it very doubtful common sense, would never have come into existence, and a great deal of injustice arising out of the application of these rules would not have been inflicted upon litigants. Until recent years there were two great branches of technical restrictions to testimony in courts of law which had no counterpart in common life. They were the Incompetence of witnesses themselves upon the ground of interest, and the Incompetency of parts of witnesses' evidence on the ground that it was hearsay. Both were based upon the same foundations: the distrust of the capacity of jurymen to detect falsehood, and the fear of the perjury of witnesses. The incompetency of witnesses on the ground of interest is now a thing of the past, except perhaps in the case of a prisoner and the husband or wife of a prisoner in criminal trials. These are, however, sometimes placed upon other grounds. We propose to consider whether the present system of rejecting parts of witnesses' testimony on the ground of hearsay ought not also to go. If there were at the present moment no rejection of hearsay in our Courts, and it were suddenly proposed to adopt the present extraordinary mass of technicalities which form the rules of evidence on the subject, such a proposition would probably meet with derision on all hands.

It is desirable to mention here that it is often said hearsay testimony is rejected on the ground that it is irrelevant. This is not a correct view, we venture to think, although justified by authority, for hearsay is often most relevant; in fact, any hearsay connected with the issues must be relevant, and to say it is

irrelevant is merely a disguised way of saying that hearsay is rejected because it is not considered sufficiently trustworthy or *competent* to be placed before the jury, in exactly the same way that formerly witnesses who had an interest in the verdict were not considered sufficiently trustworthy or competent for their evidence to be taken into consideration.

Sir Henry Maine, in his essay on the "Theory of Evidence," points out that the great bulk of the present rules of evidence "were gradually developed as exceptions to rules of the widest application which prevented large classes of testimony from being submitted to the jury. The chief of these were founded on general propositions of which the approximation to truth was but remote. Thus the assumptions were made that the statements of litigants as to the matter in dispute were not to be believed, that witnesses interested in the subject-matter of the suit were not credible, and that no trustworthy inference can be drawn from assertions which a man makes merely on the information of other men." All these objections rested upon the insufficient appreciation of the capacity of jurymen to discriminate between that testimony which was worthy of credit and that which was not; although by a very contradictory line of thought the jury has always been, and is to the present day, held to be pre-eminently the tribunal for determining the facts in cases of fraud or direct conflict of testimony.

The alleged reasons for the rejection of hearsay and of witnesses on the ground of interest being of the same general character, though possibly differing in degree, we will shortly remind our readers of the history of the gradual admission of interested persons as witnesses, and the objections formerly urged to these changes in the law. This will throw much light upon our present subject, and will, we think, form a strong argument in support of our contention that the rejection of hearsay is a mistake.

Prior to 1833 every person having an interest, however minute, in the result of the proceedings was absolutely barred from being a witness. The law had so little confidence in the capacity of jurymen to detect fraud, and so little faith in the integrity of witnesses, that lest any untruth should be presented to the jury, a law of evidence had gradually grown up the net result of which was that in the great majority of cases every one who knew most about a matter in dispute was rejected as incompetent. Yet this extraordinary state of affairs was not merely tolerated, but justified by many able lawyers; and the public, to some extent guided by and following the lawyers, acquiesced in this, to us, viewing it by the light of subsequent events, most iniquitous state of the law. The fearful havoc played with the fortunes of the litigants when in court can easily be imagined, and also the large proportion of cases where the parties had to submit in silence to wrongs because they knew or were advised they would have no evidence to produce which the court would hear.

In 1833 the first inroad upon the exclusion of evidence on the ground of interest was made by 3 & 4 Will. IV, c. 42, sec. 26, which enacted that "in order to render the rejection of witnesses on the ground of interest less frequent, if any witness should be objected to as incompetent on the ground that the verdict or judgment in the action would be admissible in evidence for or against him, he

should nevertheless be examined, but in that case the verdict or judgment should not be admissible for or against him or any one claiming under him." A much larger step was taken ten years later, in 1843, by Lord Denman's Act, by which all persons (with a few exceptions) were made competent witnesses, excluding only the parties to the suit and the husband or wife of the party.

But the lawyers and the public now began fully to awake to the mistaken policy of rejecting relevant testimony on the ground of interest, and in 1851 all parties to a suit and other interested persons became competent and compellable to give evidence, with the exception of husbands and wives. In 1853 husbands and wives of parties and interested persons became competent witnesses. The consequence of these reforms, for we may now well call them reforms, as no one would suggest a return to the old system, may be shortly summarized as follows :—For centuries a mass of legal lore had been accumulating, of which the learned deductions and discriminations had misled generations of lawyers ; to look into the law was to lose all clear vision of the real necessities of the case, and to become confounded with a huge structure of ingenious conclusions and distinctions, based upon dubious assumptions. In fact, after this vast amount of labor and this fearful havoc among litigants for centuries, we have come to the conclusion that the natural instinct of the juryman was right, and that the method he adopts in his daily life, and which he would adopt in court if he were permitted to follow his own inclination, of hearing all the persons connected with the dispute, is the right one.

The juryman is not afraid of being deceived if left to his own methods ; he is quite aware of the motives to dishonesty with interested parties, and is watchful and suspicious of fraud where there is interest, but by hearing them, even if they distort the evidence or swear falsely, he feels he knows more and is better able to give a true verdict. Shall we not carry our faith in the juryman's discernment a little further, and trust him with all the witness has to say, including hearsay, so long as he keeps to the point, and thus bring our law of evidence very close to his own unconscious rules? The juryman gives credit to his customers, invests his money, and generally carries on all the transactions of his life upon statements and representations often entirely hearsay, and this hearsay comes from persons who may have personal prejudices or a strong interest in misrepresentation. The juryman does not refuse to listen to these statements because "hearsay is no evidence," but is only too glad to receive information from any source, and generally succeeds in estimating it at about its right value. Thus, in a court of law, we have hearsay withheld from the juryman lest he might be deceived, when he spends a large part of his daily efforts in assessing it at its true value, and is thus peculiarly able to draw correct inferences from such testimony.

Apart from these general considerations and the argument they make for the admission of hearsay, we propose to consider shortly in detail the objections which are urged against this description of testimony, and to point out that many of them are more imaginary than real. We do not wish to deny that there is much weight in some of the objections, just as there was in the objections to

witnesses on the ground of interest, our contention being that on the whole more harm than good is done by rejecting hearsay.

We cannot state the case against ourselves more tersely or forcibly than by quoting a paragraph from Pitt Taylor's Evidence, 8th edition, vol. i. p. 509, which incorporates the expressions of the American Chief-Justice Marshall, in the case of *Mina Queen and Child* v. *Hepburn*, 7 Cranch's Reports, Supreme Court, U.S.:—

"That this species of evidence is not given upon oath, that it cannot be tested by cross-examination, that is supposes some better testimony, which might be adduced in the particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practiced with impunity under its cover, combine to support the rule that hearsay is inadmissible."

To take these objections in their order:—

It is quite true that hearsay testimony is not *on oath*, in the sense that the witness does not swear to the truth of the statements made to him, but only to truth of his report of the statements. But it is this true report which the jury want, just the same as they want the true report of what the witness himself said, although at the time he was speaking he may not have spoken truly. If the statements be important, and the person who made them be called at another stage of the trial, the witness's account will corroborate or contradict that person's testimony, and if he cannot be called, very important points in the case may be excluded. Moreover, this objection cannot be of much practical value, as under the curious exception of "admissions" to the general rule excluding hearsay, these hearsay statements are constantly accepted, and are of the greatest value in checking the evidence of the opposing party and also of the witness himself.

Whether or no a true report is given of statements made to the witness is probably as easy a matter to *cross-examine* to as the statements of the witness himself, or his account of his doings. Certainly the witness himself will be more easily detected in falsehood if he is to give a continuous account of his conversations and doings, than if he be able to shelter himself by only disclosing a part.

It is only sometimes true that hearsay "*supposes some better evidence which might be adduced in the particular case.*" Frequently, through death, ill-health, or absence at a distance, or other cause, no other evidence of a particular fact is obtainable, and then great injustice may be done by its exclusion. But much turns on the word "better."

Possibly *A*'s own account in the witness-box of what he said or did is, if he be a reliable witness, of more value than *B*'s report of *A*'s account to him. But just as "admissions," that is, hearsay evidence of statements by the parties to the suit, are very valuable checks upon the evidence of the parties, so hearsay evidence from *B* of what *A* said may be of great value, especially if much turn upon *A*'s evidence. Moreover, *B*'s memory of what *A* said to him is just as likely to be accurate as his memory of what he himself said, and if *A* be absent through death, ill-health, or distance, or other cause, then *B*'s evidence of *A*'s

statements is surely most material matter to be taken into consideration by the jury with the other circumstances of the case. It is true this may be obtained in cross-examination, but if so, is there sufficient reason to reject it in examination-in-chief? To do so makes *A*'s statements evidence at the option of one party and not the other.

We do not believe that the admission of hearsay evidence would in general tend to *protract judicial investigations;* we believe that in many cases it would shorten them. In some cases where other evidence is not forthcoming, or where the hearsay was particularly important, it might prolong a trial, but under these circumstances it cannot be contended that because important evidence takes time it should be rejected. The same objection operated with far more weight against the admission of interested parties as witnesses. In most cases we believe that the completeness of the witnesses' testimony and the greater speed with which it could be given without constant interruptions, would enable counsel to rapidly pick out the real points in dispute, instead of having to fish about for them in lengthy cross-examinations.

As to the "*intrinsic weakness of hearsay and its incompetency to satisfy the mind as to the existence of the fact,*" we entirely agree with this objection to a large amount of hearsay which might be offered in evidence. But the answer is very simple. When hearsay is offered which is "*incompetent to satisfy the mind of the existence of a fact*" it is irrelevant, and like other irrelevant evidence it would be excluded at once by the judge. We are advocating the admission of relevant hearsay, not of irrelevant hearsay, any more than of any other irrelevant matter. Only when the hearsay was likely to throw some light on the issues would it be admitted. Our contention is that much hearsay which would greatly assist the decision of issues of fact is rejected under the existing rules of evidence, and that such relevant hearsay ought not to be rejected.

Lastly, "*of the frauds which may be practiced with impunity under its cover,*" we do not believe in them. That false hearsay evidence should be successful is not more likely than that false evidence of any other kind should mislead the jury. But we do believe that fraud is sometimes covered by the rejection of hearsay. We have faith in the discernment of the jurymen when they hear all; they are used in their ordinary transactions to assess the value of hearsay, and we believe that the jury are more likely to arrive at a correct decision when everything is before them than when a part is kept back. An untruthful witness is soon detected, especially if he be made to tell his whole story.

The practice of the old Ecclesiastical Courts and of the Court of Chancery was very lax compared with the rigid rule of exclusion in the Common Law Courts, and notwithstanding the great aversion to hearsay in our legal system. there is still the remarkable exception of interlocutory applications, where hearsay evidence is allowed to be read. This is very inconsistent, for if hearsay is dangerous and misleading, as is commonly supposed, why admit it in interlocutory matters any more than at the trial? It is sometimes given as a reason that interlocutory applications come before a judge alone, but if this is so why is not hearsay admissible testimony at the trial by a judge alone? And if so, are

not twelve jurymen generally held to be collectively as able to detect falsehood and fraud in a witness as a judge?

We have always for simplicity spoken of the issues being decided by a jury, but our remarks apply equally to a trial before a judge alone; indeed, with even more force, if we accept the generally received view, as illustrated by the acceptance of hearsay in interlocutory applications, that the judge could reject those parts of the evidence which are not worthy of credence with more facility than a jury, a view in which we must, however, confess that we do not concur.

Sir Henry Maine's essay, from which we have already quoted, dwells principally upon the Indian Evidence Act of Sir James Stephen, and the historical influence of English rules of evidence upon Indian law, and does not direct itself, except incidentally, to the consideration of how far these rules are expedient in themselves. But he seems to regard these rules of more value as a guide to the mind in assessing testimony when given than in rejecting it. Thus he writes: "An Equity judge, an Admiralty judge, a Common Law judge trying an election petition, an historian, may employ the English rules of evidence, particularly when stated affirmatively, to steady and sober his judgment, but he cannot give general directions to his mind without running much risk of entangling or enfeebling it, and under the existing conditions of thought he cannot really prevent from influencing his decision any evidence which has been actually submitted to him, provided that he believes it." Again he writes: "The system of technical rules fails whenever the arbiter of facts—the person who has to draw inferences from or about them—has special qualifications for deciding on them, supplied to him by experience, study, or the peculiarities of his own character, which are of more value to him than would be any general direction from book or person. For this reason a policeman guiding himself by the strict rules of evidence would be chargeable with incapacity and a general would be guilty of a military crime." We think that the juryman has in his daily experience qualifications for the assessment of testimony which are of more value than "any general direction from book or person." Just as the policeman maytrack a thief by taking advantage of hearsay, when he would not do so if he followed the rules of judicial inquiries, so we think the jury would often scent the truth and real motives of the parties to a proceeding from testimony which is now not allowed to be submitted to them.

It is a noteworthy fact that nearly all the cases which are quoted as authorities for the rejection of hearsay, show upon the face of them that the whole question in dispute could not have been satisfactorily submitted to the jury without taking into consideration the very evidence which it is decided the law does not admit. In an inquiry outside a court of law the evidence rejected would have been considered most material and relevant, and in many cases the jury might have come to a different decision had the whole of the evidence been before them. Can it be seriously suggested in these cases, that the jury would have been deceived by hearsay evidence of no value, more than by other false testimony which may have been admitted? The indirectness of testimony, the interest of witnesses, the facility to perjure, are all circumstances which arouse the suspicion and watchfulness of the jury to the utmost.

The two cases quoted in Sir James Stephen's "Digest of the Law of Evidence," as authorities for the proposition that hearsay is in general inadmissible testimony, are: *Sturla* v. *Freccia*, L. R. 5 App. Cas. 623, and *Stobart* v. *Dryden* 1 M. & W. 615. *Sturla* v. *Freccia* was a suit to ascertain the next-of-kin of an intestate; the principal question was as to the identity of Mangini, the father of the intestate, with a person of that name who was born at Quarto, near Geneva. Mangini had applied to his Government, in 1789, to be appointed diplomatic agent in England. His Government handed his application over to a committee for report as to the propriety of the appointment. In the course of the report which was rendered he was described as "a native of Quarto, of about forty-five years of age," and it was also stated that the facts had been ascertained from persons well acquainted with him. The House of Lords held that this report was inadmissible on the ground that it was hearsay evidence, and not within any of the recognized exceptions. In this case there was strong suspicion that the report had been tampered with, and it is very likely that a judge or a jury would not have been satisfied to accept its statements; but to decide that this document was not to be considered by the tribunal at all, never mind how unimpeachable it might have been, was a decision as entirely contrary to one's ideas of the common-sense way of conducting an inquiry into the birthplace and identity of Mangini, as it might have conduced to a wrong decision on the facts if the document had been irreproachable. We think that a perusal of *Stobart* v. *Dryden* will also lead to the conclusion that the evidence rejected as hearsay ought to have been submitted to the jury.

It is frequently contended that a legal inquiry must, in its nature, be of a different character to an inquiry in common life, but we fail to see any essential difference as regards the kind of testimony which should be admitted, or only hearsay should be suppressed before a court of justice when it is often valuable testimony in the affairs of every-day life and a large part of the business of the world is carried on upon hearsay statements. In a court of justice there are greater powers for the discovery of the whole facts by the compulsory examination and cross-examination of witnesses, and the production of documents, hence the greater facility to detect fraud. If, therefore, hearsay is accepted outside a court of law as valuable testimony it certainly ought to be accepted inside.

As no one would now propose a return to the old system of excluding witnesses as incompetent, on the ground of interest, so we contend that if hearsay were once admitted no one would suggest a return to the present cumbrous rules by which it is rejected as incompetent. The exclusion of witnesses and the exclusion of hearsay have both arisen from the same mistrust of the discernment of juries. The exclusion of witnesses has been shown to be a mistake by experience, though long strenuously opposed by great authorities; we believe that the admission of hearsay would also be justified by experience.

The rejection of hearsay proceeds upon principles and exceptions which are extremely difficult of apprehension and which have no counterpart in common life. The rejection of hearsay often leads to the suppression of most important and valuable testimony. The very cases which are the authorities for the rejection are examples of the injustice of this practice.

The attention of jurymen is strained and often defeated by the discontinuity in the proof of a witness; the witness himself is flurried by constant interruptions in the thread of his evidence; full reports of conversations often become impossible; a fraudulent witness is less easily detected in his evasions or perjury because his narrative is so artifically told, and thereby the rejection of hearsay often becomes the cover of fraud.—*Law Quarterly Review.*

DIARY FOR APRIL.

1. Tues....County Court Non-Jury Sittings, except in York.
4. Fri.....Good Friday.
5. Sat.....Canada discovered 1499.
6. Sun.....*Easter Sunday.*
7. Mon....County Court Sittings for motions begin. Surrogate Court Sittings.
8. Tues....County Court Non-Jury Sittings, except in York.
12. Sat.....County Court Sittings for Motions end.
13. Sun.....*First Sunday after Easter.*
14. Mon....County Court Non-Jury Sittings in York. Princess Beatrice born 1857.
15. Tues....President Lincoln assassinated 1865.
18. Fri .....First Newspaper in America 1704.
20. Sun. ....*Second Sunday after Easter.*
23. Wed....St. George's Day.
25. Fri.....St. Mark.
27. Sun.....*Third Sunday after Easter.*

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Ct.] [March 8.

HAMILTON *v.* GROESBECK.

Master and servant—Injury to workman by unguarded saw—Action for negligence—"Moving," meaning of, in s. 15 of Factories' Act, R.S.O., c. 208—"Defect," meaning of, in s. 3 of Workmen's Compensation for Injuries Act, R.S.O., c. 141.

By s. 15 of the Factories' Act, R.S.O., c. 208, it is provided that all belting, shafting, gearing, fly-wheels, drums, and other moving parts of the machinery, shall be guarded.

Held, that the word "moving" is used in its transitive sense, and signifies "propelling," and that no duty is imposed by the section upon owners of saw mills to guard the saws which are propelled by the moving parts of the machinery.

By s. 3 of the Workmen's Compensation for Injuries Act, R S.O., c. 141, where personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, the workman shall have the same right of compensation and remedies against the employer as if he had not been engaged in his work.

Held, that the want of a guard to a saw was not a defect within the meaning of this provision

Such a defect must be an inherent defect, a deficiency in something essential to the proper use of the machine.

And where a workman in a saw mill was injured by being thrown against an unguarded saw, and it was shown that a guard would have prevented the injury;

Held, that an action for negligence was not maintainable against the owners at common law, nor by virtue of either of the above mentioned statutes.

Aylesworth for the plaintiff.

J. S. Fraser for defendants.

Common Pleas Division.

MACMAHON, J.]

BROWN *v.* DAVY.

Donatio mortis causa—Gift inter vivos—Evidence of—Board, nursing, and attendance on parent—Right to recover for.

J. W., who was inflicted with cancer on the face and neck, in September went to his married daughter's at the city of K., and was tended and nursed by her and another daughter. In November he was joined by his wife, who remained with him until his death, which took place in January following. Nearly three months after he had been at defendant's, another daughter asked him to give defendant the price of a piano, when he said he would not do that, but, pointing to a box in which he kept some money and promissory notes, and which he kept locked, retaining the key, said it was defendant's, to do what she liked with; but it appeared he had reference merely to satisfying defendant for her care and attention, saying there was sufficient for all. No change was made in the possession of the box and its contents, the same continuing in J. W. up to the time of his death, taking what money he required for his own use and for presents to his wife and daughters, the defendant at his request sometimes taking out money for him for such purposes. The notes were never alluded to except in the way indicated.

Held, that neither a good *donatio mortis causa* nor gift *inter vivos* to defendant was shewn; but that J. W.'s intention was that defendant should be paid for her services; and

she was accordingly allowed for the board and attendance of J. W., as well as for the board of his wife.

Macdonald, Q.C., and *Machar* for the plaintiff.

McIntyre for the defendant.

Div'l Ct.] [Dec. 21, 1889.

HAMILTON *v.* MASSIE.

Central prison—Rules creating indictable offence, authority to make—Section of Act imposing penalty, indictment under—Handcuffing, when justifiable.

Under the authority conferred by s. 6 of R.S.O., c. 217 (1877), on the inspector of prisons, to "make rules and regulations for the management, discipline and police of the central prison, and for fixing and prescribing the duties and conduct of the warden and every other officer or servant employed therein," the following rule was made, providing, amongst other things (Rule 201), "that any officer or employee who should knowingly bring, or attempt to bring, in to any prisoner any tobacco, should be at once dismissed and criminally prosecuted"; and (Rule 219) that employees of contractors must strictly conform to all rules and regulations laid down for the guidance of guards or employees of the prison, and any infractions of such rules and regulations by such employees will be promptly dealt with." By s. 27 of the Act, any person giving any tobacco to any convict (except under the rules of the institution), or conveying the same to any convict, shall forfeit and pay the sum of $40 to the Warden, to be by him recovered in any Court of competent jurisdiction.

The plaintiff, a workman in the central prison, in the employment of B., a contractor therein, was detected conveying tobacco to a convict, whereupon M., the Warden, directed McG., a constable, to arrest him, which he did, and though under no apprehension of plaintiff making any attempt to escape, handcuffed him, and led him through the public streets of Toronto to the police station. On the charge preferred the plaintiff was indicted.

Held, that the plaintiff was subject to an indictment, and therefore the arrest was legal.

Per GALT, C.J., and ROSE, J.—Under s. 6, authority was conferred to make the rules, and for disobedience thereof the plaintiff was subject to indictment, the remedy not being limited to that prescribed by s. 27.

But, per ROSE, J., in view of the opinion of MACMAHON, J., as to the effect of s. 27, that question was not of much importance, the result being the same whether indicted under the rule or statute.

Per MACMAHON, J.—The power conferred by s. 6, is limited to the objects therein expressed, and does not authorize the making of a rule to conflict with s. 27, or which would cause an offence to be created indictable at common law, but that the plaintiff was, by virtue of s. 25 of R.S.C., c. 173, subject to indictment under s. 27, the remedy thereunder not being limited to the recovery of the penalty.

Held, however, that under the circumstances the handcuffing was not justifiable, and the defendant, McG., was liable in trespass therefor; but no liability therefor attached to M., as the evidence failed to shew that he was any party to it.

McGillvray for the plaintiff.

Bigelow for the defendants.

Div'l Ct.] [Dec. 21, 1889.

WATT *v.* CLARK.

Malicious prosecution—Termination of Criminal proceedings—Evidence of—Right of defendant to prove plaintiff guilty of the criminal charge laid.

In an action for malicious prosecution, the claim was that defendant did, on the 8th of December, charge plaintiff with having on two or three occasions committed wilful perjury. The magistrate reserved his decision at the time, but on defendant preferring further charges of a similar character, the magistrate upon these and the former charges committed the plaintiff. When the matter came before the grand jury at the assizes, the prosecutor caused four charges to be laid against plaintiff, which included the charges laid on the 8th December, and which the grand jury ignored.

Held, that it sufficiently appeared that there was a termination of the prosecution in the plaintiff's favour.

The learned Judge ruled that the defendant could not produce evidence to contradict plaintiff on his statement as to the perjury, or to establish the fact of the perjury having been committed.

Held, that the ruling without qualification was too broad; for though a defendant in an

action for malicious prosecution is not bound to prove the plaintiff's guilt as charged in the criminal proceedings, still he is at liberty to do so if it be necessary to establish reasonable and probable cause; but as it appeared that notwithstanding the ruling the defendant was not precluded from adducing such evidence, the ruling was of no importance.

Pegley for plaintiff.

The defendant in person.

FERGUSON, J.]

TRUSTEES OF SCHOOL SECTION 24 OF TOWNSHIP OF BURFORD *v.* TOWNSHIP OF BURFORD AND TRUSTEES OF SCHOOL SECTION 23 OF BURFORD.

Public schools—Formation of school sections—Map of—Evidence of—Land belonging to one school section assessed to another section—Rolls finally passed—Claim for moneys paid out of municipal loan fund.

As evidence of the formation of school sections in a township by the municipal council thereof, a rough sketch or map designated "school section map, township of B.," but without signature, seal or date, was produced from the proper custody, and had the appearance of being very old, and there was no other map to be found. That in 1888, before this action was commenced, which was in 1889, but after the commencement of the agitation which gave rise thereto, the municipal council passed a by-law "to make alterations in school section map," and authorized the clerk to correct said school section map, etc.; and that when any difficulty arose as to boundaries of school sections recourse was had, at least in some instances, to this map.

Held, that this map must be assumed to be drawn in pursuance of the statute, and therefore afforded evidence of the original division of the township into school sections by the township council.

School section 24 complained that for the years 1883 to 1887 certain lots which formed part of that section had not been assessed therefor, but had been assessed as part of school section 23, and the taxes therein levied and paid over to section 23, and that section 24 was entitled to be paid these taxes either by the township or by section 23. In each of these years, so far as regards these matters, the rolls were finally passed by the Court of Revision and certified by the clerk, etc.

Held, that school section 24 could not now maintain such claim, for they were bound by sec. 57 of R.S.O., c. 180 (1877), under which the rolls as finally passed by the Court of Revision, etc., were valid and binding on "all parties concerned," school section 24 coming within their designation, but apparently they were not entitled to the notice provided for by sec. 41.

School section 24 also claimed that by reason of certain lots claimed to belong to that section being assessed as part of school section 23, section 24 did not get its proper share of the interest of the money paid the township to equalize townships that had not borrowed from the municipal loan fund, which was distributed according to the population of the school section. The contention of section 24 being to a great extent erroneous, and the amount which they might be entitled to infinitesimally small, and the amount having been distributed in good faith, the Court refused to interfere.

Bowlby for the plaintiffs.

Harley for the Township of Burford.

Wilkes for school section 23.

Div'l Ct.] [Dec. 21, 1889.

MASON *v.* NORFOLK RY. CO.

Agreement for sale of land—Obstruction to land by railway company—Rights of vendor and purchaser as to damages.

The plaintiff was in possession of certain land under an oral agreement of purchase at $450, payable in bricks, deliverable as demanded, of which $100 worth had been demanded and delivered. The defendants, without making any compensation therefor, built their railway in front of the land so as to interfere with the plaintiff's right of access, whereupon this action was brought, and damages recovered by the plaintiff, he being treated as entitled to the whole estate in the land, and the injury permanently reducing the value of the land.

Held, that the company were trespassers, and could not justify the acts complained of under the statute; that the trespass was a continuing one, and fresh damages accrued, and a new right of action arose every day; that substantial damages were recoverable for the disturbance of the possession, but, in a first action, only nominal damages for the injury to the reversion;

though, if the obstruction was continued thereafter, vindictive damages might be recovered to compel the removal of same; that if the defendants desired to prevent the bringing of fresh actions the matter should be put in train for assessment of damages.

Held, therefore, that the damages here were not properly assessed; and a new trial was directed.

Semble, that the damages for injury to the reversion belong to the vendor, and leave was given to add him as a party plaintiff.

Robb for the plaintiff.

E. D. Armour for the defendants.

Div'l Ct.] [Dec. 21, 1889.

FREEMAN *v.* FREEMAN.

Will—Validity of—Mental and physical capacity of testator—Donatio mortis causa, sufficiency of.

F., who owned a valuable farm in this Province, on which he and his family lived, raised $705 by mortgage on it, and went to the United States to obtain medical advice, as he was suffering from headache and tumour in the throat, which incapacitated him from work; and resided there with a married daughter till his death. In October a son, N., who had been living in the United States for a number of years, came to see him, and went with him to an attorney to have his will drawn, whereby his property was to be left to defendant and N., but on the attorney's ascertaining the existence of his wife and other children, persuaded him not to draw it up then. On the 8th November they again went to the attorney's, where a deed was executed by F. to N., for the express consideration of $705 and to assume the mortgage, but no money was paid, and it apparently was an arrangement to enable the son to sell the property for F., but as F.'s wife, who was named as a party, refused to execute, the matter fell through. Nothing was said at this time about the will. In December, while F. was very ill in bed, the attorney, at the request of the defendant's husband, attended to draw F.'s will, which the husband said was to be in the defendant's favor. F. was asked by the attorney if he wished his will drawn, when he nodded his head, and a will was then drawn up as the husband had instructed, which was read over to F. when, as the attorney said, F. informed him he wished N. included in it, and a new will was drawn up, devising his whole property to defendant and N., and read over to F., who, the attorney stated, said it was all right. He was then lifted up in a sitting position, but on his appearing to write with difficulty, he was asked by the attorney whether he wanted assistance, when he nodded his head, whereupon the attorney took the top of the pen and guided his hand, and the signature was written in that way. The attorney and the doctor in attendance both said they considered he had sufficient mental capacity to make a will. He was, however, very weak, both physically and mentally, and it was questionable whether he understood the purport of the will, namely, that he was devising away all his property; his understanding, if he had any, was that he was merely disposing of a sum of $500 on deposit in a bank. On the day previous, F. had requested defendant to get him the deposit receipt, when he gave it to her, telling her he wanted her to take care of him, and after payment of his debts and funeral expenses, to divide the balance between defendant and N., and that he was going to make a will. The receipt was changed to her name in the bank, and the amount deposited to her credit, which she subsequently used.

Held, that under the circumstances, the will could not be supported, but that there was a good *donatio mortis causa* of the $500.

Moss, Q.C., and *White* for the defendant.

M. Wilson for the plaintiff.

Div'l Ct.] [March 8.

BARBER *et al.* v. MCKAY *et al.*

Registration of subsequent deed — Priority — Proof of valuable consideration.

Registration of subsequent deed will not give priority over another deed prior in point of time from the same grantor, unless a valuable consideration is proved.

Bain, Q.C., for the appeal.

W. T. Allan contra.

ROBERTSON, J.] [Feb. 8.

RE BUSH.

Executor and trustee—Removal of—Trustee Act, 1850—Practice.

Where there is anything to be done under a will appointing an executor, which comes within the province of the executorship, there is no

authority to remove him from office as executor and to appoint another in his place.

In re Moore, McAlpine v. *Moore*, 21 Chy.D., 778, distinguished.

A petition to remove a trustee should be entitled "In the matter of the Trustee Act of 1850."

J. M. Clark for the petitioner.

BOYD, C.] [Feb. 20.

RE CENTRAL BANK AND HOGG.

Winding-up proceedings — Infant stockholder repudiating liability as contributory—Laches —Acquiescence.

H. signed the petitioner's (his daughter's) name to a stock subscription book of a bank, paid the calls, received the dividend cheques, which were endorsed by the daughter at her father's request. The bank was put into liquidation by winding-up proceedings, and the order for call against contributories was made on 31st October, 1888. The petitioner came of age January 31st, 1889, and took proceedings to have her name removed from the list October 30th, 1889.

Held, that there was no authority to justify fixing her with liability, and she was discharged as a contributory.

Hoyles for the petitioner.

Hilton contra.

Chancery Division.

BOYD, C.] [March 14.

SIBBALD *v.* GRAND TRUNK RY. CO.

Practice—Death between verdict and judgment —New trial—Jurisdiction.

Where, since verdict and before judgment in action for damages against a railway company, one of the parties to whom damages were awarded died, and the verdict was now moved against, on the ground of excessive damages,

Held, that the Court had power to order a new trial.

If such damages are given as are likely to work injustice in case death intervenes between verdict and judgment, the Court has the power to interfere by granting a new trial.

Shepley and *Burns* for the plaintiff.

B. B. Osler, Q.C., and *Nesbitt* for the defendants.

Div'l Ct.] [March 8.

SHAW *et al v.* MCCREARY *et al.*

Married woman—Separate estate—Liability of wife for husband keeping a wild animal on wife's property—R.S.O., c. 132, s. 14.

Plaintiff was attacked, on the public street, and injured by a bear, which had escaped from the premises of the defendants (husband and wife), where they resided. The husband had brought the bear home, and confined him in a yard, without objection on the part of the wife. The premises were the separate property of the wife.

In an action against the defendants, in which a verdict was rendered against the husband alone, the trial Judge having directed the jury that the wife was acting under the dominion of her husband, and consequently was not liable, and dismissed the action as against her,

Held (reversing Galt, C.J., C.P.), that a married woman may be liable for torts committed by her, unless acting under the coercion of her husband, which was not proved here, and that R.S.O., c. 132, ss. 3 and 14, gives her all the rights of a *feme sole* in respect of her separate property against all the world, including her husband, and that if she wished to escape the liability which attaches to the keeper of wild animals, her duty was either to have the bear destroyed or to have it sent away, and a new trial was ordered as to the wife, unless a consent be given to allow the verdict to include both defendants.

R. L. Fraser for the plaintiffs.

W. N. Miller, Q.C., for the defendant, Mary McCreary.

Practice.

ROBERTSON, J.] [Jan. 31.

IN RE SOLICITORS.

Solicitor and client—Costs of unnecessary proceedings—Disallowance of—Proceeding by writ of summons where summary application sufficient—Administration order.

The solicitors instituted an action on behalf of a young woman, one of two residuary legatees and devisees under a will, against the executors and trustees, for an account. Upon the pleadings, charges of negligence in getting in rents, etc., and of refusal to account, were made

against the defendants, and it was stated that a release was obtained from the other residuary legatee in the absence of his solicitor, immediately after his coming of age, by taking advantage of his necessities.

At the trial, judgment was given in the usual terms of an administration order, reserving further directions and costs, and by the judgment on further directions, the plaintiff was given the general costs of the action against the defendants, saving, however, costs incurred by the plaintiff proceeding by writ of summons instead of by summary application for an administration order, and the plaintiff was ordered to pay the extra costs occasioned to the defendants by such proceeding.

Held, that no question was raised by the plaintiff which could not have been disposed of in the Master's office; and, under the circumstances, in the absence of any evidence to shew that the client had, with knowledge of the practice of the Court and the risk she ran, expressly instructed the solicitors to proceed in the way they did, with knowledge of the practice of the Court and the risk she ran, they could not tax against her any more costs than they would have been entitled to had they proceeded by notice of motion instead of by writ of summons.

Scanlan v. *McDonough*, 10 C.P., 104, specially referred to.

Bain, Q.C., for the solicitors.

William Davidson for the client.

FALCONBRIDGE, J.] [Feb. 24.

IN RE SOLICITOR.

Costs—Taxation between solicitor and client—Retaining fees—Special circumstances.

The solicitor acted on behalf of a client in defending him upon a charge of arson and in bringing actions against two insurance companies to recover for a loss by fire. At the time the solicitor's services were required the client had no money, and no prospect of getting any, and in consequence of the risk the solicitor ran of getting nothing and losing a considerable sum for disbursements, the client offered him a retaining fee, to be paid out of the insurance moneys when recovered, and it was agreed between them that such fee should be $150 for the two actions, the amount claimed in the actions being about $1,250.

Held, upon appeal by the assignee of the client for the benefit of creditors from the taxation of the solicitor's costs, that under the exceptional circumstances of the case the amount of the retaining fee was not unreasonable.

D. Armour for assignee.

J. B. Clarke for solicitor.

Q.B. Div'l Ct.] [March 8.

IN RE SOLICITOR.

Solicitor and client—Taxation of Costs—Place of reference—Agency work done in Toronto—R.S.O., c. 147, s. 32.

Held, affirming the decision of STREET, J., 13 P.R., 276, that a reference for taxation of bills of costs between solicitor and client may properly be directed to one of the taxing officers at Toronto, even where the business charged for in the bills, with the exception of agency work done in Toronto, was all done in an outer county.

The words of s. 32 of the Solicitors' Act, R.S.O., c. 147, "any of the business charged for in the bill," include business performed at Toronto by the agent of the principal solicitor.

ARMOUR, C.J., inclined to the contrary opinion, but deferred to that of the other members of the court.

C. J. Holman for solicitor.

Shepley contra.

Q. B. Div'l Ct.] [March 8.

VILLAGE OF FORT ERIE *v.* FORT ERIE FERRY R. W. CO.

Issues—Separate trials of questions arising in action—Rule 655—R.S.O., c. 44, s. 52, s-s. 12.

An action brought to enforce the performance by the defendants of a certain by-law passed by the plaintiffs, and also the performance of a duty imposed by the Railway Act, came on for trial without a jury, and the trial Judge decided to try the first branch of the case separately, and after hearing evidence upon it, held that the by-law was not legally binding upon the defendants, and dismissed the action without hearing evidence on the second branch.

Held, that Rule 655 must be read in conjunction with s. 52, s-s. 12, of the Judicature Act, R.S.O., c. 44; and this case was not one calling for an application of the Rule by directing separate trials of the questions raised.

A new trial was therefore ordered.

Osler, Q.C., and *German* for plaintiffs.

A. G. Hill and *Aylesworth* for defendants.

Q. B. Div'l Ct.] [March 8.

ELLIOT *v.* MCCUAIG.

Courts — Divisional Court — Jurisdiction in County Court action—Order for arrest.

A Divisional Court has power, under Rule 1051, to set aside or vary an order for arrest made by a County Court Judge in a County Court action.

Pepler for the plaintiff.

Plaxton for the defendant.

Mr. DALTON.] [March 8.

BUILDING AND LOAN ASSOCIATION *v.* BETZNER.

Chattel mortgage—Affidavit of bona fides sworn before execution.

This was an interpleader application made by the Sheriff of Waterloo to the Master in Chambers, on the 7th March, 1890.

THE MASTER IN CHAMBERS.—In the interpleader arising out of this case it has been agreed by the parties that, instead of making an interpleader order sending this case for trial, I should consider the matter — being indeed simply a question of law — and give a final order disposing of the rights.

The claimant is a lady who advanced $1,000 on the security of a chattel mortgage, and the question is now between this mortgagee and a judgment creditor who claims to seize for his debt upon a *fi. fa.* the goods covered by the mortgage. The sheriff has interpleaded. The case, as respects the mortgagee, appears to be strictly honest and correct. The money was advanced on the 7th of the month on the mortgage security agreed to be given. It happened that the parties to the mortgage resided in different places, so the business was conducted through agents. And so by misfortune it turned out that the mortgagee swore to the statutory affidavit necessarily to be made by the mortgagee, on the 13th of the month, whereas the mortgage was not executed by the mortgagor until the following day—the 14th.

I am bound by authority exactly in point. On the 15th October, 1885, the Court of Appeal held in a case of *Reid* v. *Gowans*, which came from the County Court of Hastings, that a chattel mortgage made on the 13th, the same statutory affidavit as to which was made by the mortgagee on the 8th, was invalid. In that case, as in the present, the claim of the mortgagor was perfectly honest, but the mortgage was held bad.

If parties choose to dispute the rights of a mortgagee in such a case, they may be in a legal position to do so.

My order will be the usual final order in interpleader protecting the sheriff, and ordering him to sell the goods under the *fi. fa.* The claimant to pay all costs of the interpleader, of the sheriff, and the plaintiffs.

Because the decision given on the argument by the Court of Appeal has not been reported, I now give my decision in writing, that there may appear in the reports a reference to the case on this point.

R. V. Clement for the sheriff.

A. Cassels for the execution creditors.

Crooks for the claimant.

ROBERTSON, J.] [March 10.

FOWLE *v.* CANADIAN PACIFIC R. W. CO.

Discovery—Examination of officer of railway company—Section foreman.

In an action to recover the value of horses killed by a train on the defendants' railway, it was alleged by the plaintiff and denied by the defendants that the latter had failed to erect and maintain proper fences on either side of the railway where it crossed the plaintiff's property.

Held, that the foreman who had charge of the fences on the railway in the section which included the *locus in quo*, subject to the orders of a roadmaster, was not an officer of the defendants' who could be examined for discovery.

Knight v. *Grand Trunk R. W. Co.*, *ante* p. 90, and *Leach* v. *Grand Trunk R. W. Co.*, *ante* p. 91, followed.

C. J. Holman for plaintiff.

A. MacMurchy for defendants.

MACMAHON, J.] [March 12.

SIMPSON *v.* MURRAY.

Dismissing action—Want of prosecution—Rule 647—Default of entry for two sittings—Notice of trial for second sittings.

Where the plaintiff was in default for not giving notice of trial for the Autumn Assizes, but the defendant did not move to dismiss the action, and the plaintiff gave notice of trial for the Winter Assizes, but neither party entered the action for trial,

Held, that the action could not be dismissed for want of prosecution, under Rule 647.

McDougald v. *Thomson*, 13 P.R., 256, followed.

W. M. Douglas for plaintiff.

W. H Blake for defendant.

MACMAHON, J.] [March 17.

ONTARIO BANK *v.* TROWERN.

Judgment debtor—Examination of—Return of nulla bona.

Notwithstanding changes made in the practice, as to examining judgment debtors, embodied it Rule 926, a judgment debtor is not under the new, any more than under the old practice, examinable, until the judgment creditor has placed a *fi. fa.* in the sheriff's hands, and it has been returned *nulla bona*, or the sheriff has notified the judgment creditor that, if called upon to make a return, it would be *nulla bona.*

Walter Barwick for plaintiff.

Wm. Macdonald for defendant, F. P. Lee.

FIRST DIVISION COURT OF THE COUNTY OF MIDDLESEX.

MACKENZIE, JJ.] [Jan. 3.

STRUTHERS *v.* WATSON AND HALLIDAY, GARNISHEE.

A judgment for damages for conversion of goods which were exempt from seizure under execution, was attached in this action by garnishee summons. It was contended, on behalf of the plaintiff, that the point was governed by *Jones* v. *Thompson*, 2 B. & E., 63, and *Dresser* v. *Johns*, 6 C.B.N.S., 429, which decide that, while unliquidated damages cannot be attached, yet a judgment for such damages is liable to attachment.

Held, that having regard to R.S.O., c. 64, ss. 1-5, exempting certain goods from seizure under execution to prevent debtors and their wives and families from being deprived of the necessaries of life, the said judgment was not liable to attachment for debt. Judgment for the garnishee accordingly.

Law Society of Upper Canada.

LAW SCHOOL—HILARY TERM, 1890.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

CURRICULUM OF THE LAW SCHOOL.

Principal, W. A. REEVE, Q.C.

Lecturers, E. D. ARMOUR. A. H. MARSH, LL.B.

Examiners, R. E. KINGSFORD, LL.B. P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto, are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1890, fourteen Scholarships in all will be offered for competition, seven for those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students.

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School :

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other ora methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on eacy Monday, Tuesday, Wednesday, and Thursdah

from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Pmith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively. On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

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THE Queen's Bench Divisional Court, in *Lamb* v. *Young*, a note of which will be found at page 219 of this number, following *Johnson* v. *Hope*, 17 A.R., *ante* p. 87, decide that an assignee for benefit of creditors under R.S.O., c. 124, suing to set aside as void a mortgage of real estate made by his assignor when in insolvent circumstances, to a creditor, must, in order to succeed, establish that the creditor knew at the time he took the mortgage that the mortgagor was insolvent and unable to pay his debts in full. This is a decided advance on *Molson's Bank* v. *Halter*, 16 A.R., 323.

WE would, in the interest of the profession, most respectfully suggest to the Finance Committee of the Benchers, the desirability of obtaining a repeal of sec. 19 of the Solicitors' Act, relating to fines for failure to take out the annual certificates at the times prescribed. The amount of the fine exacted by the Society from struggling solicitors is altogether excessive and needlessly severe to obtain the end desired, and is, in truth, what it is called and purports to be, a penalty. We know of one instance where a practitioner who had just hung out his shingle was mulcted in the sum of $12, and compelled to pay it, at a time when he was struggling for bare existence. In cases of oversight, the rule operates in a manner not only unjust but oppressive. We would suggest that sec. 19 be repealed, and instead of the antiquated system of penalties, an amendment to the Act be obtained, making the fee for annual certificate $20, to be reduced to $17 if paid at the time prescribed. We think this would be sufficient to ensure punctual payment, and the Society would not then occupy the odious position of levying a tribute on the profession.

EQUITABLE EASEMENTS.

We extract the following article on this important subject from *The American Law Register*. The author, after defining an equitable easement to be a right without profit which the owner of land has acquired by contract, or estoppel, to restrict, or regulate, for the benefit of his own property, the use and enjoyment of the land of another, and distinguishing legal from equitable easements, proceeds:

The principal difference between a legal and an equitable easement is in the method of its creation and the circumstances under which the right can be enforced.

Equitable easements are in general created upon the division and conveyances in severalty of an entire tract to different grantees, and may be by reservation, by condition annexed to the grant, by covenant or by informal agreement: *Trustees of Columbia College* v. *Lynch* (1877), 70 N.Y., 445.

By Covenant or Reservation.—The enforcement in equity of easements created by covenant or reservation extends to cases where the covenant does not run with the land so as to be enforcible at law. This has been settled only after some conflict of authority. In *Keppell* v. *Bailey* (1834), 2 M. & K., 517, certain land owners and owners of iron works, and among others the lessees of the Beaufort Iron Works, formed a joint stock company, and under the provisions of the Monmouthshire Canal Act, constructed a railroad connecting a lime quarry with the several iron works. In the partnership deed of the railroad company, the lessees of the Beaufort Iron Works covenanted for themselves and their successors in interest to procure all the limestone used in their works from the said quarry, and to convey all such limestone, and also all the iron stone, from the mines to the said works along the said railroad, at a certain designated toll. A bill was filed by the shareholders of the railroad to enforce this covenant against a purchaser of the Beaufort Iron Works with notice of the partnership deed. The injunction was denied, on the ground that the covenant did not run with the land. Lord Chancellor Brougham said:—

"It appears to me very clearly that the covenant does not run with the land, and therefore is not binding upon the assignees of the [covenantors] . . . . . Between the estates of the occupiers of the three iron works, and the estates or the persons of their associates in the railway speculation, with whom they covenant, there is no privity, no connection whatever, of which the law can take notice . . . There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets, real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all lands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed."

Keppell v. *Bailey* has been overruled by *Tulk* v. *Moxhay* (1848), 2 Phil., 774, where the rule as now accepted was first established. In *Tulk* v. *Moxhay*, the plaintiff, being the owner in fee of a vacant piece of ground in Leicester Square, as well as of several of the houses forming the square, sold the vacant lot to one Ems, in fee, taking in the deed of conveyance a covenant from Ems for himself, his heirs and assigns, with the plaintiff, his heirs, executors and administrators, that the said piece of ground should be kept and maintained in sufficient and proper repair as a pleasure ground, in an open state, uncovered by any buildings, in neat and ornamental order. In granting an injunction to enforce the covenant against the purchaser with notice, Lord Chancellor Cottenham used this language:—

"It is said that, the covenant being one which does not run with the land, this Court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken. That the question does not depend upon whether the covenant runs with the land is evident from this, that if there were a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

To the same effect, *Bleeker* v. *Bingham* (1832), 3 Paige (N.Y.), 246; *Barrow* v. *Richards* (1840), 8 Id., 351; *Coles* v. *Sims* (1854), 5 De G.M. & G., 1, and cases cited in note (2); *Whatman* v. *Gibson* (1838), 9 Sim., 196; *Lord Manners* v. *Johnson* (1875), L.R., 1 Chy.D., 673. *Earl of Zetland* v. *Hislop* (1882), L.R., 7 App. Cas., 427; *Gaskin* v. *Balls* (1879), L.R., 13 Chy.D., 324; *Trustees, etc.*, v. *Lynch* (1877), 70 N.Y., 440; *Hodge, Ex'r, et al.* v. *Sloan* (1887), 107 Id.. 244; *St. Andrew's Lutheran Church's Appeal* (1871), 67 Pa., 512; *Wilson* v. *Hart* (1866), L.R., 1 Chy., 463. These covenants may be said to run with the land in equity, though not in law.

An exception to the rule that the covenant need not run with the land at law is made in those cases in which the promise under seal calls for the performance of some positive act on the land, either of covenantor or covenantee. Thus in *Austerberry* v. *The Corporation of Oldham* (1885), L.R., 29 Chy.D., 750, a number of the inhabitants of the borough, being desirous of constructing a new road, executed a deed of settlement, which recited that the making of the proposed new road would be of great public advantage; that the several parties thereto had agreed to form amongst themselves a joint stock company and to raise capital for the purchase of land for the formation of the road and making and maintaining the same, and that certain trustees had been appointed to carry out the work in accordance with a plan therein minutely described. The trustees purchased from one Elliott, the plaintiff's predecessor in title, a strip of land in the line of the proposed turnpike, at the same time covenanting for themselves, their heirs and assigns, that they, or some one of them, would, within three years, make and fence off, in a workmanlike manner, the said tract of land into a road, to form part of the road provided for in the deed of settlement, and to form the remainder of said road, which, when completed, should be kept open and maintained by the said trustees for the use of the public, subject to such tolls as should be agreed upon. Under a Borough Improvement Act, the defendant purchased the said road, gave notice to the plaintiff to repair the portion on which his property fronted, and upon refusal, proceeded to make the repairs himself. An attempt was made to collect the expenses from the plaintiff, who filed a bill praying *inter alia*, an injunction restraining the defendants from further prosecution The injunction was refused. Lord Justice Cotton said:—

"In my opinion, if this is not a covenant running at law, there can be no relief in respect of it in equity; it is not a restrictive covenant; it is not a covenant restraining the corporation, or

the trustees, from using the land in any particular way. If either the trustees or the corporation were intending to divert this land from the purpose for which it was conveyed, that is, from its being used as a road or street, that would be a very different question. . . But here the covenant, which is attempted to be insisted upon, . . . is a covenant to lay out money in doing certain work upon this land; and, that being so, . . . it is not a covenant which a court of equity will enforce; it will not enforce a covenant not running at law, when it is sought to enforce that covenant in such a way as to require the successors in title of the covenantor to spend money, and in that way to undertake a burden upon themselves. The covenantor must not use the property for a purpose inconsistent with the use for which it was originally granted; but, ... a court of equity does not and ought not to enforce a covenant, binding only in equity, in such a way as to require the successors of the covenantor himself—they having entered into no covenant —to expend sums of money in accordance with what the original covenantor bound himself to do"

The rule is now firmly established that the court will not enforce, against the grantee of the covenantor, who has himself entered into no covenant, any covenant of his grantor in relation to the premises conveyed, which does not run with the land and which requires the expenditure of money: *Moreland* v. *Cook* (1868), L.R., 6 Eq., 252; *Haywood* v. *Brunswick Building Society* (1881), 8 Q.B.D., 403; *London & Southwestern Railway Company* v. *Gomm* (1881), L.R., 20 Chy.D., 562.

Huling v. *Chester* (1885), 19 Mo. App., 607, though an action at law, illustrates the distinction between covenants creating easements and covenants which can only be enforced where there is privity of contract. Huling and W. R. Chester being the owners of adjoining lots, by agreement under seal, provided for the erection of a line wall by Huling, and for payment for half of such wall by Chester, within six months from the date of the agreement, or at his option, by himself or his grantees, when he or they built upon the premises using the part of the wall standing thereon. Prior to his death, Huling placed the line wall as agreed, one half on the W. R. Chester lot. C. M. Chester, the defendant, purchased the lot from W. R. Chester, with notice of the contract, and erected a building on the lot, using the party wall. This action was brought by the heirs of Huling to recover the cost of one half of the wall. The court held that the plaintiffs could maintain an action for any interference with their enjoyment of the easement in the party wall, but could not, as owners of the Huling lot, maintain an action for the compensation which was to be paid to Huling personally. The right being personal to Huling, upon his death went to his personal representatives.

There is a class of cases in which equity grants relief by compelling the expenditure of money in the performance of the covenant, but in these cases the remedy is sought against the original covenantor, and relief is granted by way of specific performance, and is regulated by principles affecting that branch of equitable jurisdiction. Of this class of cases, *Randall* v. *Latham* (1869), 36 Conn., 48, is an example. In that case, the complainant claimed a right, under one Thomas, to the water from a raceway. Thomas, and the respondent Latham, who was the original covenantor, were respectively the owners of mills on the same stream. Thomas conveyed to Latham a tract of land adjoining the mill of the latter. The deed contained a reservation that the grantor should have the privilege of drawing water from the ditch of Latham's mill, and that

Latham and his successors should keep a spout ten inches square in the inside at the bottom of the ditch, to which the grantor should at all times have access for the purpose of drawing water. The ditch was never owned by Thomas, and he had no interest in it, beyond that acquired by this provision in his deed to Latham. The Court sustained the complainant's bill, saying—

"The deed purports to require the respondent to put in the spout upon land not conveyed, and the question is whether a court of equity can compel him to do it under the circumstances of the case. That the respondent, by accepting the deed containing the provision, thereby agreed to perform this duty, there can be no doubt. This duty was a part of the consideration of his deed. The respondent has received full compensation, and it is difficult to see why he is not bound to perform it."

In the case of easements created by reservation, courts of equity are more liberal than courts of law. On technical grounds, there is doubt whether at law, a reservation in a deed of conveyance, will create an easement in other lands of the grantee than the lands granted and conveyed to him. In equity there is no embarrassment on this subject. Thus, in *Case* v. *Haight* (1829), 3 Wend. (N.Y.), 632; s.c. 1 Paige (N.Y.), 447, Schuyler owned the south side of the lower falls in the outlet of Lake George, and also the land under the bed of the stream. Deals and Nichols were the owners of the lands on the north shore, and to them he made a grant of the bed of the stream, reserving to himself, his heirs and assigns, the right to abut any dam, or dams, on both sides or shores of the said waters. An injunction was granted to restrain a breach of the covenant. In construing this reservation, Sutherland, J., said—

"The reservation can have no effect as an exception. . . . . The deed of Schuyler did not convey, or profess to convey, any part of the north shore; he could not therefore reserve a right to build a dam against it. But, though void as an exception, the reservation is binding upon the grantees and their assigns, and becomes operative either as an implied covenant or by way of estoppel. The deed is to be construed as though the parties had mutually covenanted that each should have a right to butt a dam upon the shore of the other."

By Parol Agreement.—In *Tulk* v. *Moxhay* (1848), 2 Phil., 774, it was said, that if there was a mere parol agreement, and no covenant, the court would enforce it against a party purchasing with notice, on the ground that if an equity be attached to the property by the owner, no one purchasing with notice of that equity, can stand in a different situation from the party from whom he purchased. The agreement may be either written or oral. Thus, in *Tallmadge* v. *The East River Bank* (1862), 26 N.Y., 105, the owner of lots on both sides of a city street made a plan exhibiting the street as widened eight feet on each side, and represented to several vendees of different lots that all the buildings to be erected on the lots he had sold and should sell, should stand back eight feet from the line of the street. The vendees erected buildings in conformity with this plan: none of them being restricted by their conveyances or bound by any covenant in respect to the extent or mode of their occupation. An injunction was granted to restrain a subsequent purchaser of one of the lots, with constructive notice of the facts, from building upon the eight feet adjoining the street. The Court said—

"From the facts found by the judge at special term, it appears . . . . that the strips of eight feet in width on both sides of the street should not be built upon, but kept open. It is to be presumed that they [the purchasers] would not have bought and paid their money except upon this assurance. It is to be presumed that, relying upon this assurance, they paid a larger price for the lots than otherwise they would have paid. Selling and conveying the lots under such circumstances and with such assurances, though verbal, bound Davis [the vendor] in equity and good conscience to use and dispose of all the remaining lots, so that the assurances upon which Maxwell [a purchaser and one of the plaintiffs in the suit] and others had bought their lots, would be kept or fulfilled. This equity attached to the remaining lots, so that any one subsequently purchasing from Davis any one or more of the remaining lots, with notice of the equity as between Davis and Maxwell and others, the prior purchasers, would not stand in a different situation from Davis, but would be bound by that equity."

To the same effect, *Parker* v. *Nightingale* (1863), 6 Allen (Mass.), 341; *Newman* v. *Nellis* (1884), 97 N.Y., 285; *Lenning* v. *The Ocean City Ass'n* (1886), 14 Stew. Eq. (N.J.), 606. The mere exhibition, however, of a plan, with proposed streets and buildings marked upon it, or representing the land as laid out in a particular manner, will not create a contract, in the absence of any stipulation affecting the course of improvements: *Squire* v. *Campbell* (1836), 1 Myl. & Cr. 458. The apparent conflict between these cases is explained by difference in the facts involved. In the New York case, the facts found by the judge at special term, and the facts admitted by the pleadings, showed that the lots were bought upon the assurance or agreement of Davis that all the houses on the plan, as shown in the map, were to be set back eight feet from the street. In the English case, the plan was exhibited upon the treaty for a lease. The lease as executed, contained on the margin another plan which did not extend to include that part of the property on which the injunction, if granted, would operate. In the former case, the evidence established a parol contract collateral to the grant; in the latter, the affidavits presented tended to vary the extent and form of the plan as embodied in the lease, and, in that respect, to alter the terms of the written contract.

The restriction on the use of the property must not amount to a general restraint of trade; for the law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry or his capital, in any useful undertaking in the kingdom, would be void: *Homer* v. *Ashford* (1825), 3 Bing., 326; *Brewer* v. *Marshall* (1868), 4 C. E. Green (N.J.), 537.

The rule as to what will constitute an illegal contract, as laid down in the leading case of *Mitchell* v. *Reynolds* (1711), 1 P. Wms., 181, is that where the restraint is not general, but partial, and is founded on a valuable consideration, it cannot be said to be an unreasonable restraint; and a restraint preventing a person from carrying on trade within a certain limit of space, though unlimited as to time, may be good, and the limit of space may be according to the nature of the trade: *Catt* v. *Tourle* (1869), L.R., 4 Chy. App., 654; *Trustees, etc.*, v. *Lynch* (1877), 70 N.Y., 440; *Hodge* v. *Sloan* (1887), 107 Id., 244; *Wilson* v. *Hart* (1866), L.R., 1 Chy. App., 463; *Luker* v. *Dennis* (1877), L.R., 7 Chy. D., 227.

Change in Character of Property.—A court of equity will not enforce a covenant of the character under consideration, where the complainant has caused or permitted a material change in the property, for the benefit of which the scheme of restriction was adopted, nor where, by reason of the altered condition of the property, it would be oppressive to give effect to the covenant or agreement. This question arises in three classes of cases: *first*, where the complainant has himself altered the condition of the property with respect to which the scheme of improvement was devised; *second*, where he has permitted breaches by other covenantors; and, *third*, where the condition of things has been altered by changes referable to the acts of others. Thus in *Duke of Bedford* v. *Trustees of the British Museum*, often cited as the British Museum case, (1822), 2 M. & K., 552, the Duke of Bedford, being the owner of all the property in the neighbourhood of the British Museum, for the protection of a large part of that property, took a covenant from the person to whom he sold or let other parts of the property, restricting them from building otherwise than in a particular way. He afterwards himself built upon a large part of the property which was originally intended not to be built upon. In refusing his application for an injunction to restrain the defendant, being the grantee of the original covenantor, from building in violation of the covenant, the Court said—

"If this deed is permitted to be urged against what I must call, not the legal, but the actual intention of the parties, and if you have the means of obtaining any remedy, you may have recourse to your deed; but you cannot, under such circumstances, come into a court of equity for a remedy which the court never grants, except in cases where it would be strictly equitable to grant it. It is impossible to state as the doctrine of a court of equity, that the court will carry into execution a specific covenant, in all cases where the legal intention of the deed is found. . . . . The question is whether, from the altered state of the property, altered by the acts of the party himself, he has not thereby voluntarily waived and abandoned all that control which was applicable to the property in its former state."

To the same effect are *Sayres* v. *Collyer* (1883), L.R., 24 Chy. D., 180; *Lattimer* v. *Livermore* (1878), 72 N.Y., 174.

Where the covenant is framed to provide uniformity in the mode of building, so that the enjoyment which springs from regularity in a series of dwellings may be preserved, he who seeks to enforce the covenant must suffer no such breach of the stipulation by other grantees as will frustrate all the benefit that would otherwise accrue to the other parties to the agreement. Thus, in *Roper* v. *Williams* (1822), 1 T. & R., 17, the defendant Williams had conveyed to the plaintiff a piece of ground, being part of a larger tract, convenanting for himself, his heirs, appointees and assigns, that all buildings to be erected on the adjoining land of the grantee should be built in a certain manner. The bill stated that Williams had contracted to sell, and was about to convey to the defendant, Burnand, part of the land belonging to him to the west of the plot conveyed to the plaintiff, without requiring any stipulation that Burnand should refrain from building houses in a manner not comformable to his covenant, and that Burnand had agreed to let the land for the erection of houses not in conformity with the covenant. It appeared by affidavits, that four years previously another

grantee of part of the tract had been permitted to build in disregard of the restriction. Lord Chancellor Eldon said—

"Every relaxation which the plaintiff has permitted, in allowing houses to be built in violation of the covenant, amounts *pro tanto* to a dispensation of the obligation intended to be contracted by it. Very little, in cases of this nature, is sufficient to show acquiescence; and courts of equity will not interfere unless the most active diligence has been exerted throughout the whole proceeding. . . . . In every case of this sort, the party injured is bound to make immediate application to the court in the first instance; and cannot permit money to be expended by a person, even though he has notice of the covenant, and then apply for an injunction. Taking all the circumstances together, the permission to build contrary to the covenant, and the laying by, four or five months, before filing the bill, this is not a case in which a court of equity ought to interfere by injunction, but the plaintiff must be left to his remedy at law."

So, also, *Peek* v. *Matthews* (1867), L.R., 3 Eq., 515; *Gaskin* v. *Balls* (1879), L.R., 13 Chy. D., 324; *Eastwood* v. *Lever* (1863), 4 DeG., J. & S., 114; *Child* v. *Douglass* (1854), 5 DeG., M. & G., 739.

The waiver relied upon, must be in respect of a material violation of the covenant. In *German* v. *Chapman* (1877), L.R., 7 Chy. D., 271, the law is recognized to be, as stated in *Roper* v. *Williams*, that—

"If there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence, or by a long chain of things, the property has been either entirely, or so substantially changed, as that the whole character of the place or neighbourhood has been altered, so that the whole object for which the covenant was originally entered into, must be considered to be at an end, then the covenantee is not allowed to come into the court for the purpose merely of harassing and annoying some particular man, where the court could see he was not doing it *bona fide*, for the purpose of effecting the object for which the covenant was originally entered into."

The Court (in *German* v. *Chapman*) then proceeded—

"That is very different from the case we have before us, where the plaintiff says that in one particular spot, far away from this place, and not interfering at all with the general scheme, he has, under particular circumstances, allowed a waiver of the covenant. I think it would be a monstrous thing to say that nobody could do an act of kindness, or that any vendor of an estate who had taken covenants of this kind from several persons, could not do an act of kindness, or from any motive whatever, relax in any single instance any of these covenants, without destroying the whole effect of the stipulations which other people had entered into with him. For instance, in this very case, application was made to the plaintiff for a waiver. It would be monstrous to suppose, if he had acceded to that application, that therefore he was, by the mere act of kindness to the defendants themselves, destroying the whole benefit of the covenants as to all the rest of the estate."

The same ruling in *Western* v. *Macdermott* (1866), L.R., 1 Eq., 499, s.c. affirmed on appeal (1866), L.R., 2 Chy. App., 72; *Kent* v. *Sober* (1851), 1 Sim., N.S., 517.

Where a contingency has happened, not within the contemplation of the parties, which imposes upon the property a condition frustrating the scheme devised by them, and defeating the object of the covenant, thus rendering its enforcement oppressive and inequitable, a court of equity will not decree such enforcement. In *Trustees of Columbia College* v. *Thatcher* (1881), 87 N.Y., 311, the covenant was not to erect, establish or carry on in any manner, on any part of the said lands, any stable, school-house, engine-house, tenement or com-

munity house, or any kind of manufactory, trade or business whatsoever, or erect or build, or commence to erect or build, any building or edifice with intent to use the same, or any part thereof, for any of the purposes aforesaid. The breaches relied on by the plaintiff were that the defendant permitted the use of the several rooms in the houses upon the premises by his tenants, for the business of a tailor, milliner, insurance agent, newspaper dealer, tobacconist, and two express carriers. It also appeared that the general current of business had reached and passed the premises, and that during the pendency of the action, an elevated railroad was built with a station in front of such premises, which the trial court found affected them injuriously, and rendered them less profitable for the purpose of a dwelling house, but did not render their use for business purposes indispensable. The evidence also disclosed that the station covered a portion of the street, its platform occupied half the width of the sidewalk in front of defendant's premises, and from it persons could look directly into the windows, and that this, with the noise of the trains, rendered privacy and quiet impossible, so that large depreciations in rents and frequent vacations followed the construction of the road. Mr: Justice Danforth, speaking for the Court, said—

"It is now claimed by the appellant that there has been such an entire change in the character of the neighbourhood of the premises, as to defeat the object and purpose of the agreement, and that it would be inequitable to deprive the defendant of the privileges of conforming his property to that character, so that he could use it to his greater advantage, and in no respect to the detriment of the plaintiff. The agreement before us recites, that the object which the parties to the covenant had in view was 'to provide for the better improvement of the lands, and to secure their permanent value.' It certainly is not the doctrine of court of equity to enforce, by its peculiar mandate, every contract, in all cases, even where specific execution is found to be its legal intention and effect. It gives or withholds such decree, according to its discretion, in view of the circumstances of the case, and the plaintiff's prayer for relief is not answered, where, under those circumstances, the relief he seeks would be inequitable. . . . If for any reasons, therefore, not referable to the defendant, an enforcement of the covenant would defeat either of the ends contemplated by the parties, a court of equity might well refuse to interfere; or if, in fact, the condition of the property by which the premises are surrounded, has been so altered 'that the terms and restrictions' of the covenant are no longer applicable to the existing state of things. . . . And so, though the contract was fair and just when made, the interference of the court should be denied, if subsequent events have made performance by the defendant so onerous, that its enforcement would impose great hardship upon him and cause little or no benefit to the plaintiff. . . . In the case before us, the plaintiffs rely upon no circumstances of equity, but put their claim to relief upon the covenant and the violation of its conditions by the defendant. They have established, by their complaint and proof, a clear legal cause of action. If damages have been sustained, they must, in any proper action, be allowed. But, on the other hand, the defendant has exhibited such change in the condition of the adjacent property, and its character for use, as leaves no ground for equitable interference, if the discretion of the court is to be governed by the principles I have stated, or the cases which those principles have controlled."

See also the *dictum* above quoted from *Roper* v. *Williams* (1822), 1 T. & R., 17.

Object of Restriction.—It must also appear, either from the terms of the agreement, from the circumstances in which it originated, or the situation and condition of the property, that the restriction was intended to benefit that property, and not merely for the personal advantage of the original covenantee: *Keates* v.

Lyon (1869), L.R., 4 Chy. App., 218; *Parker* v. *Nightingale* (1863), 6 Allen (Mass.), 341; *Peck* v. *Conway* (1876), 119 Mass., 546; *Sharp* v. *Ropes* (1872), 110 Id. 381; *Clark* v. *Martin* (1865), 49 Pa., 289; *Tod-Heatly* v. *Benham* (1888), L.R., 40 Chy.D., 80. In *Nottingham Patent Brick and Tile Company* v. *Butler* (1886), 16 Q.B.D., 778, Lindley, L.J., stated the law to be as decided in *Harrison* v. *Good* (1871), L.R., 11 Eq., 338, "that it is an inference of fact in each case, whether the purchasers are bound *inter se* by such covenants, and that the mere fact that the vendor does not bind himself expressly to enforce the covenants which he takes for the benefit of the purchasers, is not material." It is the community of interest in the beneficial restriction which necessarily requires and imports reciprocity of obligation. This in *Renals* v. *Cowlishaw* (1878), L.R., 9 Chy.D., 125, the former owners in fee of a residential estate and adjoining lands, sold part of the adjoining lands to the defendant's predecessors in title, who entered into a covenant to build upon the land thereby conveyed, within a certain distance from a particular road; that the garden walls or palisades to be set up along the sides of the said road should stand back a certain distance from the centre of the road; that any house to be built upon the land adjoining the road, should be of a certain value, and of an elevation at least equal to that of the houses on a particular road; and that no trade or business should be carried on in any of such houses or buildings, but that the same should be used as private dwelling houses only. The conveyance did not state that this covenant was for the protection of the residential property, or in reference to the adjoining pieces of land, or make any statement or reference thereto. Other pieces of the adjoining lands were subsequently sold, and the conveyance to the purchaser in each case contained restrictive covenants similar to that above mentioned. The same vendors afterwards sold the residential estate to the plaintiff's predecessors in title. The conveyances contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers of the residential estate were to have the benefit of them; there was, moreover, in the conveyance to the plaintiffs, a covenant not to build a public house or carry on offensive trades upon a particular portion of the property conveyed, thus limiting their use of the purchased property, but not co-extensively with those convenants first given. Vice-Chancellor Hall dismissed a bill to restrain the defendants from building in contravention of the first mentioned covenants. In his judgment he said:

"From the cases . . . it may, I think, be considered as determined, that any one who has acquired land, being one of several lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by, and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that the right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but where a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase. In considering this, the expressed or otherwise apparent purpose or object of

the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into, is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant; whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important."

The Vice-Chancellor, being satisfied that the restrictive covenant was not inserted for the benefit of the particular property, but to enable the vendors to make the most of the property they retained, refused to order an injunction. This decision was affirmed by the Court of Appeals in (1879), L.R., 11 Chy.D., 866, and cited with emphatic approval in *Spicer* v. *Martin* (1888), L.R., 14 App. Cas. 12; *Master* v. *Hansard* (1876), L.R., 4 Chy.D., 718; *Badger* v. *Boardman* (1860), 16 Gray (Mass.), 559; *Tobey* v. *Moore* (1881), 130 Mass., 448; *Thurston* v. *Minke* (1870), 32 Md., 487. And where the restrictions are made for the benefit of the property, and enure in favor of the persons who become the respective owners of it, the original covenantee cannot by release discharge any part of it except such as he still retains: *Raynor* v. *Lyon* (1887), 46 Hun. (N.Y.), 227.

Title to land within the tract, for the common benefit of which the easement is created, is the only other requisite to support a prayer for an injunction to restrain a violation of the covenant by any proprietor. As restrictions of this nature are intended for the mutual protection of all the proprietors, neither privity of contract nor privity of estate is essential, and a prior may have a remedy against a subsequent purchaser of part of the same tract, even when a parol representation of a uniform building plan is the sole evidence of the contract: *Tobey* v. *Moore* (1881), 130 Mass., 448; *Talmadge* v. *The East River Bank* (1862), 26 N.Y., 105; *Gibert* v. *Peteler* (1868), 38 Id., 165; *Green* v. *Creighton* (1861), 7 R.I., 1.

It is necessary that the defendant purchase with full notice of the agreement. It is binding upon him, not because he stands as assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform: *Whitney* v. *Union Ry. Co.* (1858) 11 Gray (Mass.), 359; *Phœnix Ins. Co.*, v. *Continental Ins. Co.* (1882), 87 N.Y., 400. And slight circumstances will be construed as equivalent to notice of the existence of the equity. Thus, in *Talmadge* v. *The East River Bank*, cited above, the uniformity in the position of houses erected in the immediate neighborhood, in conformity with a general building plan, was held to be sufficient to put the purchaser on inquiry and charge him with notice. Similarly, *Salisbury* v. *Andrews* (1880), 128 Mass., 336; *Morland* v. *Cook* (1868), L.R., 6 Eq., 252.

It remains only to consider what will amount to a violation of an equitable easement, and the remedy which a court of equity will apply. The owner of the servient tenement can do no act on his land which interferes substantially with the easement, or with those rights which are requisite to the full enjoyment of its benefits; but the utmost extent of the duty which rests on the owner of the

servient tenement, is not to alter its condition so as to interfere with the enjoyment of the easement: Gal. & What. on Ease't, 7, 339; *Kirkpatrick* v. *Peshine* (1873), 9 C. E. Green (N.J.), 206; *Johnston* v. *Hyde* (1881), 6 Stew. Eq. (N.J.), 632. The extent to which the owner of the servient tenement is interdicted from the exercise of acts of ownership on his lands, will depend on the nature and qualities of the easement: *Atkins* v. *Bordman* (1841), 2 Metc. (Mass.), 457. Where a penalty or forfeiture is annexed to the doing of the act prohibited, this penalty does not authorize the party to do the act, and before the act is done, the Court will restrain him by injunction, unless it appears from a fair construction of the instrument that it was intended to make the stipulated sum the price of non-performance; but if the act is done the penalty must be paid, and the amount is unimportant: *French* v. *Macale* (1842), 2 Dru. & War., 269; *Coles* v. *Sims* (1854), 5 DeG. M. & G., 1; *The Phœnix Ins. Co.* v. *The Continental Ins. Co.* (1882), 87 N.Y., 400; *The Diamond Match Co.* v. *Roeber* (1887), 106 Id., 473; *National Provincial Bank of England* v. *Marshall* (1888), L.R., 40 Chy.D., 112. Nor is it necessary to show that any damage has been done. A covenantee has the right to have the actual enjoyment of the property, *modo et forma*, as stipulated for by him. The mere fact that a breach of the covenant is intended, is a sufficient ground for the interference of the court by injunction: *Kirkpatrick* v. *Peshine* (1873), 9 C. E. Green (N.J.), 206.

The usual and proper equitable remedy for a breach of a negative covenant or agreement, is an injunction. This will be awarded as of course, upon proof of the complainant's right and its violation by the defendant. In some cases, the court will import a negative quality into the covenant, and enforce the right by injunction: Kerr's Injunctions in Equity, 521; *Newman* v. *Nellis* (1884), 97 N.Y., 285. Thus, in the English brewers' leases, covenants are usually inserted stipulating for the purchase from the lessor of all the beer consumed at the public house demised. Such rights will be protected by injunction, against assignees with notice, even where they extend to other public houses held by the same lessees under other landlords: *Luker* v. *Dennis* (1877), L.R., 7 Chy.D., 227; *Catt* v. *Tourle* (1869), L.R., 4 Chy. App., 654. The ground of decision is, that the grant of an exclusive right of this description, contained in a covenant, is equivalent to a negative covenant, and the cases are thus brought under the operation of the rule in *Lumley* v. *Wagner* (1852), 1 D. M. & G., 604, that wherever a court of equity has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, so far as they can be bound, to a true and literal performance of their agreements, and will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. By thus importing a negative quality into an affirmative covenant, the courts have assumed to enforce agreements of which specific performance could not be decreed: *Cooke* v. *Chilcott* (1876), L.R., 3 Chy.D., 694. The propriety and extent of this exercise of jurisdiction it is not within the scope of the present article to examine.

Where interference with the easement is merely threatened, the preventative remedy by injunction is always adequate to the exigencies of the case; but if there has been an actual interference, a mandatory injunction may become necessary to supplement the usual remedy. The power of the court to grant such relief, though once questioned, is now admitted beyond doubt. In *Rankin* v. *Huskisson* (1830), 4 Sim. 13, the agreement was that no buildings should be erected on the plot of ground, south of the demised premises. The complainants built thereon, and afterwards the defendants began to erect stables on the adjoining land. Vice-Chancellor Shadwell awarded an injunction restraining the defendants, not only from continuing the projected buildings, or commencing any other buildings whatever, on the plot of ground described in the pleadings, or any part thereof, but also from permitting such part of said building as had been already erected to remain thereon. See note (1) to *Rankin* v. *Huskisson*; Kerr on Injunction, 231. The extreme limit of this jurisdiction, however, is the restoration of the property to its condition at the time the wrongful act or neglect began.

As has been said, specific performance of a proper covenant to perform positive acts, will be decreed, if the covenant is one which runs with the land, or if the bill is filed against the original covenantor. What are proper covenants under this head of equitable jurisdiction is a question to be determined solely under the rules regulating the granting of that kind of relief. It is unnecessary to discuss its limitations here.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We continue the Law Reports for March comprised in 24 Q.B.D., pp. 269-360; 15 P.D., pp. 25-36; 43 Chy.D., pp. 185-315; 15 App.Cas., pp. 1-51.

PARTNERSHIP—INTEREST IN LAND—AGREEMENT TO RETIRE—INTEREST IN LAND—STATUTE OF FRAUDS AGREEMENT EVIDENCED BY DRAFT—MORE FORMAL DOCUMENT INTENDED—SPECIFIC PERFORMANCE—RIGHT TO USE NAME OF RETIRED PARTNER.

Gray v. *Smith*, 43 Chy.D., 208, was an action for the specific performance of an agreement for the retirement of two partners from a firm, in which one or two points of law arise. The firm was composed of Gray, Smith & Bennett, and the agreement which the action was brought to enforce was as follows: "Rough draft—Memorandum from Gray, Smith & Bennett: This is to record that, in consideration of William Gray, or his executors, paying H. C. Bennett, or his assigns, the sum of £100 on the 1st of January, 1890, and the sum of £100 on the 1st of January for the nine succeeding years, H. C. Bennett agrees to withdraw from the firm of Gray, Smith & Bennett." This was signed by Bennett and delivered by him to the plaintiff. In the first place, the question was raised before Kekewich, J., whether this agreement was a sufficient memorandum within the Statute of Frauds of the assignment of Bennett's interest in the partnership lands. That learned judge was of opinion that though a partnership in

land may be proved by parol evidence, yet an agreement by one partner to assign his share in the land held in partnership to another must be evidenced by a sufficient memorandum within the Statute of Frauds, and that the memorandum was sufficient, within the statute. Then it was urged that the memorandum was not conclusive, because it was apparent a more formal document was intended to be drawn up; but he was of opinion that all material parts of the agreement had been embodied in the "rough draft," and though it might be intended to reduce it afterwards to a more business-like shape, yet the agreement was, without that being done, a binding and enforcible contract. On appeal the first point was not argued, but the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) expressed their approval of Kekewich's decision, that a writing was necessary for the assignment of a partner's share in partnership lands, and they also affirmed his decision as to the memorandum being sufficient under the Statute of Frauds and enforcible, notwithstanding a more formal document was intended. They also decided the further question, that as there was no agreement to assign the good-will, Gray had no right to use Bennett's name by carrying on the business in the name of the old firm. The point as to the agreement being a concluded one is neatly put by Cotton, L.J., thus: "They did not intend to leave to their solicitors whether they should make an agreement, but only how the agreement they had made should be carried out."

EXECUTION OF POWER—GENERAL BEQUEST—WILLS ACT, S. 27—(R.S.O., C. 109, S. 29).

Phillips v. *Cayley*, 43 Chy.D., 222, is a decision of the Court of Appeal which sets at rest a point which has been the subject of conflicting decisions in the courts below. North, J., *In re Marsh*, 38 Chy.D., 630, having taken one view, and Kay, J., in *Charles* v. *Burke*, not reported, and Chitty, J., in *Robinson* v. *Burke*, 41 Chy.D., 417, and Kekewich, J., in the present case, having taken the other, the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) affirmed that taken by the majority of the judges in the courts below. Under the Wills Act, s. 27 (R.S.O., c. 109, s. 29), a general bequest in a will is to be construed to include any personal estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention appears by the will; and the question was, whether a general bequest in a will would, under the statute, be an execution of a power which imposed a condition on the mode of its execution by will, which condition was not complied with by the will in question. In this particular case the condition imposed by the settlement was, that the power, if exercised by will, must expressly refer to the power, and the will in question contained no reference to the power. Under these circumstances the Court of Appeal, agreeing with Kekewich, J., held that the statute did not apply, and that the will was not an execution of the power.

SHIP—MARITIME LIEN—TOWAGE.

In *Westrup* v. *Great Yarmouth S. C. Co.*, 43 Chy.D., 241, a question was raised which one would have thought would, in a great maritime nation like

England, have long since been placed beyond the region of controversy, and that was, whether there is any maritime lien for ordinary towage services rendered to a ship? It is somewhat surprising to find that there appears to be hardly any direct authority on the point. Kay, J., determined that there is no lien for such services.

WILL—DEVISE—CONTINGENT REMAINDER—PERPETUITY—REMOTENESS—POSSIBILITY UPON A POSSIBILITY.

In re Frost: Frost v. *Frost*, 43 Chy.D., 246, is a case upon the construction of a will, made by the testator in 1870, and who died the same year, by which a freehold estate was limited to trustees for his daughter E. for life, and after her death, "to the use of any husband whom she may hereafter marry" for his life: and after the death of the survivor of them, to the use of the children of his daughter, as she should appoint, and in default of appointment, to the use of all the children of the daughter who should be living at the death of her and her husband, or should have previously died leaving issue then living; but in case no child of his daughter should be living at the death of such survivor, or should have previously died leaving issue then living, then to the use of such of the testators and of his other daughters as should be then living, or should have previously died leaving issue then living, in equal shares. The will contained a residuary devise. The daughter E. was a spinster at the testator's death, but in 1872 married, and died shortly afterwards without issue. Her husband died in 1888. Kay, J., held that the limitations subsequent to the life estate to the daughter's husband were void for remoteness, and that on his death the estate passed under the residuary devise. He points out that the estate to the trustees was only for the life of E., and that consequently on her death the subsequent limitations to the husband and those in remainder were limitations of a legal estate. That the daughter might have married a person unborn when the testator died, and that, therefore, the limitation over to the children of the marriage would offend against the rule against perpetuities, and that the devise over could not be supported as a contingent remainder because it offended against the rule which prohibits limiting a possibility upon a possibility. The double possibility in this case being the possibility of the daughter marrying a person unborn at the date of the testator's death, and, secondly, her having issue by such person.

WILL—DEBT OF TESTATOR—LEGACY TO CREDITOR—DIRECTION TO PAY DEBTS ONLY—SATISFACTION.

The point *In re Huish: Bradshaw* v. *Huish*, 43 Chy.D., 260, which Kay, J., had to decide was, whether a debt due by a testator had been satisfied by a legacy under the following circumstances: The testatrix in her lifetime had given her nephew, to whom she was not *in loco parentis*, a bond for £1,000, payable within 12 months after her death to him, if living, or to his representatives if he should be dead leaving issue him surviving, but not otherwise. The bond was given on his marriage and was, with the knowledge of the testatrix, assigned to the trustees of his marriage settlement. By her will she made various gifts

to her nephew, including a legacy of £3,000 to him absolutely. A codicil directed "all just and lawful debts" to be paid at once. Kay, J., under the circumstances, held that the bond was not satisfied by the legacy, and that the direction to pay debts had the same effect as a direction to pay debts and legacies, and the distinction drawn by *Edmunds* v. *Low*, 3 K. & J., 318, was not a sound one. The rule that a direction to pay debts, or debts and legacies, is sufficient to prevent a legacy to a creditor from being deemed a satisfaction of the debt, seems anyway a somewhat artificial one.

RESTRICTIVE COVENANT—BUILDING SCHEME ON SALE OF ESTATE—IMPLIED COVENANT BY VENDORS—INJUNCTION.

McKenzie v. *Childers*, 43 Chy.D., 273, was an action to restrain the owners of an estate which had been laid out under a building scheme, and part of which had been sold to the plaintiffs, or their predecessors in title, subject to certain restrictive covenants as to building and use of the property, from selling the residue of the estate without such restrictions. The defendants had not given any express covenant not to sell otherwise than in accordance with the building scheme, but the deeds which they gave to the plaintiffs recited that it was intended to be a part of all future contracts for sale of the other lots that the purchasers should be subject to the same restrictions. The defendants, finding some of the lots which remained on their hands were unsaleable under the restrictions which had been imposed on the plaintiffs and their predecessors in title, were now attempting to sell them free from such restrictions; and it was held by Kay, J., that the recital in the deed was not a mere expression of intention which the plaintiffs were at liberty to change, but that it amounted to a covenant not to permit the unsold portions to be used in a manner inconsistent with the conditions of the building scheme under which the plaintiffs had bought, and the injunction was therefore granted as prayed.

PRACTICE—JUDGMENT IN DEFAULT OF DEFENCE—RELIEF ASKED BEYOND WHAT IS CLAIMED IN STATEMENT OF CLAIM.

Faithful v. *Woodley*, 43 Chy.D., 287, is an illustration of the rule of practice, that on the hearing of a cause, in default of defence, the Court will not grant any relief beyond what is asked by the statement of claim. In this case the action was for foreclosure, and the statement claimed that a specified amount was due, but asked that an account might be taken. The defendant did not appear, and on the motion for judgment the plaintiff asked for a personal order for immediate payment of the amount claimed to be due, but this was refused.

MARRIAGE SETTLEMENT—WIFE'S AFTER ACQUIRED PROPERTY—COVENANT BY HUSBAND TO SETTLE—WIFE'S REVERSIONARY INTEREST—FUND FALLING INTO POSSESSION AFTER WIFE'S DEATH.

Fisher v. *Shirley*, 43 Chy.D., 290, is a decision of Stirling, J., as to the effect of a husband's covenant, contained in a marriage settlement, to settle his wife's future property. The settlement was made in 1841, and contained a covenant by the husband that if the wife, or he in her right, should become entitled to any

other property whatever, the same should be settled on the trusts of the settlement. At the date of the marriage the wife was entitled to a vested interest in an unascertained share of a fund in reversion, expectant upon the death of certain persons. The wife died in 1852, leaving her husband surviving; the fund in question came into possession in 1888, the husband being still living. It was held that the covenant extended to the fund, and was not restricted to property falling in during the coverture, where the husband survives, though it would be so restricted where the wife survives.

TRUSTEE—BREACH OF TRUST—PREVIOUS ADMINISTRATION ACTION—INFANTS—RES JUDICATA.

Worman v. *Worman*, 43 Chy.D., 296, was an action brought against trustees, alleging a breach of trust and claiming relief. The breach of trust complained of was the purchase of an equity of redemption in certain property, upon which part of the trust funds were invested upon a second mortgage. A previous action for administration had been brought by other beneficiaries of the trust, who also complained of the same breach of trust, and the present plaintiffs, who were then infants, were served with the judgment in that action, and by order had liberty to attend the proceedings. That suit was ultimately compromised before any report had been made, and a petition was presented to the Court to which the present plaintiffs were respondents, praying *inter alia* that a partition might be made of the trust property, and that the sum of £2,500, which the plaintiff in that action had agreed to accept as her share in the trust property, might be raised and paid to her, and the proceedings stayed. The alleged breaches of trust were not referred to in this petition, though all the facts connected therewith were disclosed in the previous proceedings. The defendants now contended that the purchase of the equity of redemption having been made as being, in the best judgment of the trustees, the best course to take with a view to protecting the estate from loss, and which had had the effect of saving it from a greater loss, was not a breach of trust, and even if it were, the plaintiffs were precluded from complaining of it by reason of the compromise effected in the previous action to which they were parties; but Kekewich, J., held the purchase of the equity of redemption was a breach of trust, because, by the terms of the trust, the trustees had no power to invest the trust funds in that way, no matter what their motive in doing so may have been; and further, that the former action was merely a compromise of the claim of the plaintiff in that action, and did not estopp the present plaintiffs from complaining of the same breach of trust.

PRACTICE—AWARD—EXTENDING TIME FOR MOVING TO SET ASIDE AWARD—ORD. LXIV., R. 7 (ONT. RULE 485).

The point of practice decided by Kekewich, J., *In re Oliver & Scott's Arbitration*, 43 Chy.D., 310, was, that under Ord. lxiv., r. 7 (Ont. Rule 485), the court has now power to extend the time for moving against an award, although the time limited by 9 & 10 Wm. III., c. 15, s. 2, as enlarged by r. 14 of the same order, may have expired.

ACTION ON FOREIGN JUDGMENT.

Turning now to the appeal cases, we find in *Noniron* v. *Freman*, 15 App.Cas., 1, the House of Lords have affirmed the decision of the Court of Appeal, 37 Chy.D., 344 (noted *ante* vol. 24, p. 203), that an action will not lie on a foreign judgment which is not final and conclusive.

VENDOR AND PURCHASER—CONDITIONS OF SALE—RIGHT TO RESCIND CONTRACT.

In *Wolcott* v. *Peggie*, 15 App.Cas., 42, which was an appeal from the Supreme Court of Victoria, the Privy Council held, where a sale of land had been made subject to a condition that the vendor might annul the sale on his being unable, or unwilling, to remove any objection to the title, and it appeared that the purchasers had conditionally offered to give time for the removal of an objection which they had taken, and that the vendor, on good faith, objected to the proposed conditions, and was thereupon threatened by the purchasers with litigation; that under these circumstances the vendor was entitled to rescind; and the judgment of the court below dismissing the action, which was for specific performance of the contract, after the vendor had given notice of rescission, was therefore affirmed.

Correspondence.

To the Editor of THE CANADA LAW JOURNAL:

DEAR SIR,—I like your last number much, and I was pleased to see that you had taken that very singular article from *Pump Court* about lithographed signatures, where the judges say that the subject is one upon which no two men could differ—and yet they all differ, the one from the other. The "glorious uncertainty" stands out in bold relief—and what a nice amount of costs might have been incurred if two rich litigants had been the parties interested! It has often struck me that the great facility of appeal from court to court, and the possibility, or even probability, of one winning his case and losing it ultimately, amounts almost to a denial of justice. Especially is this the case when we consider that, after having been encouraged to believe that he is right by judge after judge, a suitor of moderate means may be ruined by his first success, and through reliance on the judges appointed, and well paid, by Government to decide his case. I would suggest that the Government be compelled to pay the costs incurred by the mistake or negligence of the judges whose decisions were reversed on appeal to the court of last resort. The judges might not like it, but it would certainly make them more careful. If I employ a professional man, and by his want of skill or diligence about the work which he is employed to do I suffer damage, he must indemnify me. I employed him relying on the maxim "*cuique in arte sua perito credendum est*," and he turns out not to be sufficiently *peritus*. The public who pay the judges do so believing them to be *peritissimi*. Where is the fallacy?

We have the new Banking Act at last. I hope you will procure a copy, and tell us what you think of it. I, for my part, do not quite like the idea of the good banks guaranteeing the notes of the weaker ones, who might be tempted to issue by this provision—but, *nous verrons*. There, I have sinned by writing you officially in French (to you, a champion of Equal Rights!). Pardonnez, Monsieur. By the way, do you exchange with the *Canada Francais Review?* The last number contains a statement of the amount of Peter's Pence for last year, viz., $600,000, which, at one soul for each penny, would make sixty million souls. A goodly number to make into good Presbyterians, or Methodists, not to say Churchmen. I wish we could so manage it. The *Review* is under the supervision of the Professors of Laval, and is well written.

You will remember that in a little book I printed for private circulation only among my friends, and of which I gave you a copy, I made the following remarks about certain violations of the Act of 1887, amending that respecting the Independence of Parliament: "Many members have since resigned under its provisions, and almost all of them have been re-elected. The Act says nothing about profits (if any) obtained by the violation of the law, leaving the question open, as a matter of conscience, on which honourable members could scarcely have any doubt. Hamlet's uncle had a very strong opinion on the point:—

> "'Then I'll look up,—
> My fault is past—But oh, what form of prayer
> Can serve my turn:—Forgive me my foul murder,—
> That cannot be, since still I am possessed
> Of those effects for which I did the murder,
> My Crown, mine own ambition, and my Queen:—
> May one be pardoned and retain the offence?'
>
> —"*Hamlet, Act 3, sec. 3.*"

I should like to know how far you think the cases referred to in the said note are like one now under the consideration of the Election Committee of our House of Commons, and what in that case, if the alleged offence should be found to have been committed, would be the effect of such finding as regards profits the offenders made by such offence.

Ottawa, 27th March, 1890. W.

[We publish with pleasure the foregoing letter from an old subscriber to this journal and an esteemed contributor to its columns. It was not written for publication, but we think it may be of interest to our readers. We spare no pains in making the JOURNAL useful and interesting to our patrons, and we are pleased that our number for March 17 is approved by so competent a critic and judge as our Ottawa correspondent, *laudatus a laudato*.—ED. C.L.J.]

Reviews and Notices of Books.

The Lawyers' Periodical Statutory Record. By A. H. F. LEFROY. Toronto: Rowsell & Hutchison.

The object of this useful compilation is to show the supplementary amending and repealing enactments since the last Revised Statutes of Canada and of Ontario. It should have a place in the library of every practitioner, as we have found it most useful in saving time in referring to recent legislation.

The Western Law Times. Vol. I.

In 1885 *The Manitoba Law Journal* ceased publication, much to the regret of the profession in Manitoba. *The Western Law Times*, the first number of which has just been published, takes its place. The objects of its editors are to discuss questions of interest to the Bar of Manitoba and of the West, and to digest the current decisions. The first number, excellently printed on good paper, contains the salutatory and an interesting article on Law Schools, besides notes and comments and reports of legal decisions. If it keeps up the promise of its first number, it will prove to be one of the most valuable of our exchanges. We extend to it a hearty welcome, and wish it a generous support and every success.

Notes on Exchanges and Legal Scrap Book.

STATUTE-BARRED MORTGAGE DEBTS.—We cite from the *Law Journal* the following article on the construction of sec. 8 of the English Real Property Limitation Act (1874), corresponding with sec. 23 of R.S.O., c. 111. The Court of Appeal, in *Allan* v. *McTavish*, 2 A.R., 278, and *Boice* v. *O'Loan*, 3 A.R., 167, differ from the result arrived at in *Sutton* v. *Sutton;* and in the later case of *McMahon* v. *Spencer*, 13 A.R., 430, intimate that *Sutton* v. *Sutton* and the subsequent English decisions will not be followed. "Though all would agree that it is well that there should be some limit to the period within which it is possible to disturb the possessor of property, it may appear to many that the law is somewhat arbitrary in the various periods which it has fixed, and that the consequent confusion is wholly unnecessary. Be that as it may, the Legislature in its wisdom has ordained that the subject of the bar of actions by lapse of time should require some research, and we propose in this article to discuss by the light of modern decisions the limitations of actions for the recovery of mortgage debts. The Real Property Limitation Act, 1874, s. 8 (R.S.O., c. 111, s. 23), provides, in effect, that proceedings shall not be taken to recover any sum of money secured by mortgage, or otherwise charged upon or payable out of any land or rent, at law or in equity,

but within twelve years after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless meanwhile some part of the principal or interest shall have been paid, or some acknowledgment of the right thereto shall have been given in writing by the person liable, or his agent, to the person entitled thereto or his agent. After any part payment or acknowledgment the twelve years start afresh. In the well-known case of *Sutton* v. *Sutton*, L.R. 22 Chy.D., 511, it was unsuccessfully contended that this limitation only applied to the remedy against the land, and that the covenant to pay was not barred till twenty years. The Court of Appeal, however, held that the right to the mortgage debt was wholly extinguished. This was quickly followed by the case of *Fearnside* v. *Flint*, L.R. 22 Chy.D., 579, where the plaintiff sought to distinguish his claim from that in *Sutton* v. *Sutton*, as he had a collateral bond. Lord Justice (then Mr. Justice) Fry held that the fact that the covenant was on a separate piece of parchment could make no difference, and decided that his action on the bond was barred. A daring surety endeavoured *In re Powers*, L.R., 30 Chy.D., 291, to avoid payment in an action on a bond, conditioned to be void if the mortgagor paid the principal money and interest in accordance with the covenants in the mortgage. The mortgage debt itself was not barred, but it was contended on behalf of the surety that, as he had made no payment and given no acknowledgment for twelve years, no money could be recovered on his bond. The Court of Appeal decided against the surety. Lord Justice Bowen said: "An action against the mortgagor for the debt is an action to recover money which is charged on land. But an action on a bond given by another person to guarantee payment of that debt is not a proceeding against the same person, nor to recover the same sum; it is an action to recover damages from a third person because the mortgagor does not pay." *In re Frisby: Alison* v. *Frisby*, L.R., 43 Chy.D., 106, the surety was a party to the mortgage deed, and he and the mortgagor jointly and severally covenanted to pay both principal and interest. The claim was not barred against the mortgagor, but as the surety had made no payment himself, it was contended by his representatives that the right of action was dead against his estate. They also relied on the Mercantile Law Amendment Act, which provides that no co-contractor or co-debtor shall lose the benefit of the Statute of Limitations (3 and 4 Wm. 4, c. 42, s. 3) by reason of payment of any principal or interest by a co-contractor or co-debtor. There is not any such saving with regard to the provisions of the Act of 37 & 38 Vict., c. 57. There was a difference of opinion amongst the judges as to whether the said section 8 applied to a surety at all or not, Mr. Justice Kay and Lord Justice Bowen thinking that it did not, while Lord Justice Cotton thought that it did, and Lord Justice Fry expressed no opinion on the point. Their lordships were, however, unanimous in their judgment that, if that section did apply, payment by the mortgagor was sufficient to keep the debt alive against the surety. It may be observed that the section refers not only to a mortgage properly so-called, but also to money "charged upon or payable out of any land or rent." In a recent case the Master of the

Rolls in Ireland has decided that the principle of *Sutton* v. *Sutton* applies to an annuity charged upon real and personal estate, though that case was decided under different sections (*Re Nugent's Trusts*, 19 Law J. Rep. Ir. 140). Mr. Justice Kay held, *In re Stephens: Warburton* v. *Stephens*, L.R., 43 Chy.D., 39, that where a testator charged his debts on his real estate, a debt incurred between six and twelve years before a summons was taken out to adjudicate on it, though barred as against the personal estate was alive as against the realty. *Lewin* v. *Wilson*, L.R., 11 App. Cas., 639, is a decision of the Privy Council on the right of a mortgagee to foreclosure, and Lord Hobhouse, in delivering the judgment of their lordships, said: "In this case their lordships think it sufficient to say that payments made by a person who under the terms of the contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the defeasance or redemption of the mortgage, are payments which . . . . give a new starting-point for the lapse of time." It is presumed that that decision would apply by analogy to any payment made under section 8 of the Limitation Act (R.S.O., c. 111, s 23), so that if money were advanced to A., and both A. and B. entered into covenants to pay, payments by B. would keep the debt alive. Where a man mortgaged a reversionary interest in personalty to his father, but paid no interest and gave no acknowledgment, and the father made another son his executor and residuary legatee, and the reversion did not fall in till nearly thirty years after the date of the mortgage, Mr. Justice Kay held that the executor had a perfect right to retain the property in payment of the mortgage debt. and that no Statute of Limitations applied (*Re Hancock: Hancock* v. *Berry*, 57 Law J. Rep., Chy., 793)."

LIEN FOR MONEYS ADVANCED TO KEEP UP LIFE POLICIES.—Two recent cases, *Re Earl of Winchelsea's Policy Trusts*, L.R., 39 Chy.D., 168, before Mr. Justice North, and *Strutt* v. *Tippett*, before the Court of Appeal on January 30th, show how dangerous it is for a stranger to advance moneys for keeping up a life policy in the expectation of obtaining a lien thereon for his advance, unless it is made upon the request (express or implied) of the beneficial owner of the policy.

In re Leslie, Leslie v. *French*, L.R., 23 Chy.D., 552, in a judgment of Lord Justice Fry (written after he had been appointed a Lord Justice of Appeal, but which Mr. Justice Pearson adopted as his own), it is said, page 560: "In my opinion a lien may be created upon the moneys secured by a policy by payment of premiums in the following cases: First, by contract with a beneficial owner of the policy; secondly, by reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation; thirdly, by subrogation to this right of trustees of some person who may at their request have advanced money for the preservation of the property; fourthly, by reason of the right vested in mortgagees or other persons having a charge upon the policy to add to their charge any moneys which have been paid by them to preserve the property." In *The Earl of Winchelsea's Policy Trusts*, L.R., 39 Chy.D.,

172, Mr. Justice North observed: "The principles enunciated by Lord Justice Fry in *Re Leslie* were in substance adopted by the Court of Appeal in *Falcke* v. *The Scottish Imperial Insurance Company*, L.R., 34 Chy.D., 234, and I think the Court intended to lay down exhaustively all the cases in which a person not the sole beneficial owner of a policy, who pays a premium in respect of it, is entitled to a lien upon the proceeds of the policy for the amount which he has paid." But in *Strutt* v. *Tippett*, although the Court held that the stranger who had there paid premiums had not any lien (a decision which seems to have been founded mainly on a special agreement), it would seem that Lord Justice Lindley was of opinion that the list of cases in *Re Leslie* in which a lien could be obtained was not necessarily exhaustive.

In *The Earl of Winchelsea's Case* policies on his life (and apparently in his name) were assigned by way of mortgage, the equity of redemption being reserved to the earl. A term in real estate was vested in trustees in trust, among other matters, out of the income, to keep down the interest and the premiums on the policies. The earl became bankrupt, and some time afterwards died. Meanwhile, the rents being insufficient to provide for payment of a premium, the trustee of the term had advanced the requisite amount to save the policy from lapse. It did not appear that this advance was made at the request either of the mortgagees or of the trustee in bankruptcy (it is not stated whether it was made with the knowledge of the latter). The trustee of the term claimed the application of a fund in Court, representing the balance of the policy moneys which remained after satisfying the mortgage, towards repayment of the premium. Mr. Justice North held that the case was not within the second rule in *Re Leslie*. The trustee of the term had "no trust and no duty in respect of the policy moneys." And the trustee in bankruptcy was declared entitled to the fund.

It would seem that notice of an intended payment of a premium might be important, as in *West* v. *Reid*, 2 Hare, 249, where, the mortgage of a policy being contested by the assignees in bankruptcy of the mortgagor, the solicitors of the mortgagees offered to pay a premium then coming due, if authorized to do so by the assignees; they, however, declined to interfere. The premiums were, in fact, paid by the mortgagees till the life dropped, and it was held that the mortgagees, though not entitled to the policy itself, had a lien for the premiums so paid, with interest. Lord Justice Cotton (L.R., 34 Chy.D., 244), referring to the case, thinks "it might well be held that there were circumstances from which the law would imply a request or a contract to pay these premiums if the policy ultimately turned out to belong to the assignees and not to the party making the payment"; and Lord Justice Bowen observes (p. 249): "Wherever you find that the owner of the property saved knew of the service being performed, you will have to ask yourself (and the question will become one of fact) whether under all the circumstances there was either what the law calls an implied contract for repayment or a contract which would give rise to a lien." Lord Justice Fry, in *Re Leslie*, L.R., 23 Chy.D., 561, refers to the law relating to "confusion:" "If I

pour my gold into your heap, or put my silver into your melting-pot, or turn my corn into that in your granary, I have no right to an account or any relief against you;" but in *Colwill* v. *Reeves*, 2 Campbell, 576, Lord Ellenborough assigns as a reason, because "it is impossible to distinguish what was mine from what was yours;" but such a reason seems inapplicable to a premium, where the amount must be known. And according to 2 Blackstone, 405 (Kerr's ed., vol. ii., p. 358), "if the mixture be by consent, both proprietors have, according to the English as well as the civil law, an interest in common in proportion to their respective shares."

As Lord Justice Cotton observes, L.R., 34 Chy.D., 241, a man who "does work upon a house without request gets no lien on the house for the work done." But in that case the house remains in existence, and to give such a lien would be to allow the stranger "to improve the owner out of his property." As to a policy, however, unless the premium is paid, the policy drops, and it would seem to be on this ground that claims for "salvage" have been urged. "It is said to be contrary to natural equity that one person should gain by another man's loss" (L.R., 23 Chy.D., 562), and possibly the maxim, "*Qui sentit commodum sentire debet et onus*" may give one reason why the question of lien has so often been mooted. Lord Justice Fry, L.R., 34 Chy.D., 254 (like Vice-Chancellor Kindersley in *Aylwin* v. *Witty*, 30 Law J.Rep,Chy., 860), doubts whether the term salvage can with propriety be applied to cases of this description. At all events, a person entitled to an interest in an equity of redemption cannot claim a lien for payment of premiums as against his mortgagee (*Falcke* v. *The Scottish Imperial Insurance Company*, L.R., 34 Chy.D., 243), for "it would be strange indeed if a mortgagor, expending money on the mortgaged property, could establish a charge in respect of that expenditure in priority to the mortgage"—compare *Otter* v. *Lord Vaux*, 6 D.M.G., 638.—*Law Journal.*

Baron Alderson had a very profound dislike to scientific witnesses, especially those of the medical profession, called upon to give an opinion upon the evidence they had heard in court, and he rarely failed in proposing some question to them which eventually proved a floorer.

At the end of a very long examination of a celebrated medical man, who had been called upon to establish the incompetency of a deceased testator to make a will, the witness unfortunately said that he believed "all persons were subject to temporary fits of insanity."

"And when they are in them," asked the judge, "are they aware of their state?"

"Certainly not, my lord," was the reply; "they believe all they do and say, even if nonsensical, to be perfectly right and proper."

"Good Lord!" exclaimed Alderson, "then here have I taken no less than thirteen pages of notes of your evidence, and, after all, you may be in a fit of temporary insanity, talking nonsense, and believing it to be true!"—*The Green Bag.*

DIARY FOR APRIL.

1. Tues....County Court Non-Jury Sittings, except in York.
4. Fri.....Good Friday.
5. Sat.....Canada discovered 1499.
6. Sun.....*Easter Sunday.*
7. Mon....County Court Sittings for motions begin. Surrogate Court Sittings.
8. Tues....County Court Non-Jury Sittings, except in York.
12. Sat.....County Court Sittings for Motions end.
13. Sun.....*First Sunday after Easter.*
14. Mon....County Court Non-Jury Sittings in York. Princess Beatrice born 1857.
15. Tues....President Lincoln assassinated 1865.
18. Fri .....First Newspaper in America 1704.
20. Sun. ....*Second Sunday after Easter.*
23. Wed....St. George's Day.
25. Fri.....St. Mark.
27. Sun.....*Third Sunday after Easter.*

Reports.

FIRST DIVISION COURT, COUNTY ONTARIO.

HENRY *v.* THE BOARD OF EDUCATION OF THE TOWN OF WHITBY.

Teacher—Contract of hiring—High School Act—R.S.O., c. 226, s. 47.

Held, under the contract of hiring, and the circumstances set out below, that the plaintiff was not entitled to be paid according to the manner provided for in the High School Act, R.S.O., c. 226, s. 47.

Observations as to the construction and meaning of that section.

[Whitby, Jan 25.

In the month of July, 1886, the plaintiff made application to the defendants as a candidate for the Mathematical Mastership of the defendants' Collegiate Institute. On the 19th of July, 1886, the defendants' secretary communicated to the plaintiff a letter which reads:

"I am directed by the Board of Education to inform you that you have been appointed to the position of Mathematical Master of the Collegiate Institute here, at a salary of $1,000 per annum, subject to the following conditions:—

"That the Board of Education shall retain one month's salary in arrears. That the Board and the teacher may at their option respectively terminate the engagement by giving notice in writing to the other of them, at least three calendar months previously, so as to terminate on the last day of a calendar month. Duties to commence 30th August, 1886."

Thereupon, the plaintiff entered upon his duties as master on the 1st Sept., 1886, and continued to act in that capacity until the 15th Oct., 1888, when the engagement was terminated by mutual consent, both parties waiving notice.

Nothing was said by either party, regarding arrears of salary, and the plaintiff received from the defendants all that he was entitled to, on the basis of monthly payments, at the rate of $1,000 a year.

The plaintiff made claim for a further sum, over what he had already received, and the defendants, by resolution, refused to entertain his claim. On the 11th June, 1889, he commenced this action.

The particulars read thus:

To balance of salary for the year 1886,	$66.67
" balance of salary for the year 1888,	14.15
" interest of $80.82 for 6 months at 6,	2.40
Total,	$83.22

The following is an abstract of the plaintiff's evidence. "There were 205 teaching days, in in 1886, of these I taught 88; I make no claim for that year. In 1888 I ceased teaching here, on the 11th October, at noon. In 1886, I taught 82 days, out of 205 teaching days. I was paid for 4 calendar months in that year; for this year I claim $\frac{82}{205}$ of $1,000. I taught 160½ days in 1888."

Cross-examined:—I have received 2 years pay in full and one month's pay, in addition, and credits for $13.35 on my taxes, and am chargeable with 80c. for telegrams. I abandon any claim for 1888 (query, 1886?). The total amount I have received is $2096.68 and the 80c. for telegrams.

DARTNELL, J.J.—The questions raised for adjudication here are:—

1. What, independent of the High Schools Act, is the true construction of the agreement between the parties?

2. Is the contract in any way controlled, affected or subject to the provisions of the High Schools Act, R.S.O., chap. 226, sec. 47?

3. In either case, has the plaintiff been paid in full, and, if not, how much is he entitled to?

My interpretation of the contract is that it was a hiring for an indefinite period, salary payable and vesting monthly (subject to one month's draw-back), at the rate of $1,000 a year, determinable by either party, on giving 3

months' notice, as required by the letter f appointment.

Upon this construction of the contract, and without regard to the other question raised, I think the plaintiff has been fully paid.

Section 47 of the High School Act, R.S.O. chap. 226, enacts :—

"Every master or assistant of a High School shall be entitled to be paid his salary for the authorized holidays occurring during the period of his engagement with the trustees, and in case his engagement extends three months, or over, he shall then be paid in the proportion which the number of days during which he has taught bears to the whole number of teaching days in the year.

The word "then" I take to mean "in that case."

S. 154 of the Public Schools Act (R.S.O.,c. 225) provides that :—

"Every qualified teacher of a public school, employed for any period not less than three months, shall be entitled to be paid his salary in the proportion which the number of teaching days during which he has taught in the calendar year bears to the whole number of teaching days in such year."

The words in italics are added in the last revision and are not to be found in the former Act ; the words "months *and* over" now read "months *or* over." If the altered phrases have made any change in purport or effect, the former Act must govern, for the contract in question was made before the new revision came into effect (see 50 Vict., c. 2, s-s. 3 of s. 9.) The Interpretation Act, s. 15, enacts that "year" shall mean a "calendar year."

The plaintiff contends that "year" means the year commencing 1st January and ending 31st day of December.

I can give it here no such construction. I take it, a year can or does commence from any particular date or event. The municipal year and the fiscal year commence at dates other than January 1st, yet are measured as calendar years.

It is to be noted that the verbiage of the two clauses differ. If, as is asserted, it was meant to ensure a teacher payment for the holidays, it is remarkable that one clause expressly provides for this, while the other is silent on the point.

The plaintiff says he is paid in full for the year 1887. He claimed a balance, according to his mode of computation, but finding he had been credited with an order for his taxes for 1888, he chooses to apply that order in extinguishment of this balance, and bases his whole claim upon the amount he contends to be due him, calculated upon the proportionate number of teaching days he taught in the year 1888.

I have come to the conclusion that the provisions of the statute, as then in force, do not apply to the particular contract herein, and that the plaintiff is precluded by this and other circumstances from recovering.

The plaintiff's construction is extremely plausible, and may be considered to be strengthened by the alteration made by the revision. The defendants admitted that the provision was there for some purpose and to meet some case, but no suggestion was advanced as to its purpose or intent.

My own interpretation of the clause, as it formerly stood, and I offer it with great diffidence, is a paraphrase in these words :

"When a teacher is engaged for any certain fixed period, extending three or beyond three months, and if, for any reason, and without a new engagement, he serves for any number of teaching days after the expiring of such fixed period, he shall be paid for such supplementary services according to the proportion such days during which he so taught bears to the total number of teaching days in the current year."

If this interpretation be correct, it is clear that the plaintiff's case does not come within its scope, and may be almost considered the converse of it.

Further, I think the claim is not even an equitable one. If the Board had relied upon the strict terms of his engagement, he would have lost the honorable promotion he was offered and obtained and also its increased emoluments. They had to consider whether they had to put up with the partial disorganization of a school consequent upon a change of masters, or retain the services of a disappointed and perhaps soured and discontented servant.

It is to be remarked that we have it in his own words that at the time of the severance of the connection "nothing was said about arrears of pay." No such claim was then made. The defendants thought they were paying him in full, and if such demand had been then made, it might materially have modified their action. They had no opportunity of considering it ; it

was not made until after the plaintiff had left their service and in the words of the common phrase, "he had got the whip hand of them."

To my mind the plaintiff's claim was entirely an after-thought, and his action is dismissed with costs.

Under the terms of the statute, in order that the Minister of Education may consider whether my judgment is properly appealable, I withhold the formal entry of judgment for thirty days from this date.

[NOTE—A copy of the above judgment was communicated to the Minister of Education, who replied that as at present advised, he did not think it appealable, but reserved a final expression of opinion until the plaintiff appealed. The plaintiff did not appeal.]

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Ct.] [March 8.

DODDS *v.* CANADIAN MUTUAL AID ASSOCIATION.

Insurance—Life—Provision for payment in case of "total disability"—Construction of provision—Evidence.

The plaintiff, who was a farmer, had his life insured by the defendants, and there was a clause in the policy or certificate of insurance providing that in case of "total disability" of the insured, the insurers would pay him one-half of the amount of the insurance. About two years after effecting the insurance, the plaintiff conveyed his farm to his son, reserving to himself and wife certain benefits, but continued to work upon the farm for about a year thereafter, when he was attacked by bronchitis and asthma.

In an action to recover one-half the amount of the insurance, the evidence shewed that the plaintiff was totally disabled, permanently and for life, from doing manual labour, and that the diseases from which he suffered were the proximate and immediate cause of his disability. A medical witness said he considered the plaintiff's condition attributable to a considerable extent to his advanced years, he being about seventy.

Held, that total disability to work for a living was what was intended to be insured against, and disability from old age was not excluded, and the evidence shewed that the plaintiff came within the terms of the certificate. The arrangement made by the plaintiff with his son after the certificate was issued could have no effect upon the prior contract of insurance.

Elgin Meyers for the plaintiff.

Watson, Q.C., for the defendants.

Div'l Ct.] [March 8.

LAMB *v.* YOUNG.

Bankruptcy and insolvency—Insolvent debtor—Mortgage to creditor—Action by assignee under R.S.O., c. 124, to set aside—Notice or knowledge of insolvency.

Held, following *Johnson* v. *Hope*, 17 A.R., that an assignee for the benefit of creditors under R.S.O., c. 124, suing to set aside as void a mortgage of real estate made by his assignor when in insolvent circumstances, to a creditor, must, in order to succeed, establish that the creditor knew at the time he took the mortgage that the mortgagor was insolvent and unable to pay his debts in full.

Mackelcan, Q.C., and *Mewburn* for plaintiff.

Clute, Q.C., for the defendant.

Div'l Ct.] [March 8.

IN RE DERBY AND THE LOCAL BOARD OF HEALTH OF SOUTH PLANTAGENET.

Municipal corporations—Public Health Act, R.S.O., c. 205, s. 49—Payment for services of physician—Judgment against local board of health as a corporation—Order upon treasurer of municipality—Mandamus.

Section 49 of the Public Health Act, R.S.O., c. 205, provides that "The treasurer of the municipality shall forthwith upon demand pay out of any moneys of the municipality in his hands the amount of any order given by the members of the local board, or any two of them, for services performed under their direction by virtue of this Act."

A physician recovered judgment in a Divi-

sion Court against a township local board of health, sued as a corporation, for services performed in a small-pox epidemic.

It appeared that the physician had been appointed medical health officer of the municipality by the council, but that before suing the the board he had brought an action against the municipal corporation for his services, in which he failed.

Upon motion by the physician for a mandamus under s. 49 to compel the members of the board to sign an order upon the treasurer of the municipality for the amount of the judgment recovered ;

Held, that, although it might be difficult to conclude that a board of health is constituted a corporation by the Act, yet the judgment of the Division Court practically decided that this board might be sued as such, and, not being in any way impeached, it could not be treated as a nullity. As there appeared to be no other remedy, the applicant was entitled to the mandamus.

Shepley for W. J. Derby.

Aylesworth for members of local board of health.

Div'l C't.] [March 8.

REID *v.* COLEMAN.

Partnership — Dissolution — Want of public notice— Credit given to firm after dissolution —No previous dealings with firm— Liability of retiring partner.

The plaintiffs received from their traveller an order for goods from the firm of C. Bros., hotelkeepers. Before they delivered the goods they became aware by means of a mercantile agency that a partnership had existed under the name of C. Bros., and that S. L. C. was one of the of the members of it, and they were at the same time informed that the partnership still existed. They shipped and charged the goods and also goods subsequently ordered to C. Bros. As a matter of fact, however, the partnership did not exist at the time the first order was given, S. L. C. having retired from the business, and the plaintiffs had had no dealings with the firm while it was in existence. No public notice was given of the dissolution; S. L. C. continued to live at the hotel except when he was absent on his own business; the lamp with the name of C. Bros. continued at the door; the liquor license in the name of C. Bros. continued to hang in the bar-room; the letter-paper with the heading "C. Bros., proprietors," continued to be handed to customers.

Held, that where a known member of a firm retires from it, and credit is afterwards given to the firm by a person who has had no previous dealings with it, but has become aware, as one of the public, that it existed, and has not become aware of his retirement, the retiring member of the firm is liable, unless he shews that he has given reasonable public notice of his retirement; and, as such notice was not given here, S. L. C. was liable, not only for the goods first ordered, but for those subsequently ordered, no notice of the retirement having ever been given.

C. Millar for plaintiffs.

J. M. Clark for defendant, S. L. Coleman.

Div'l C't.] [March 8.

MENDELSSOHN PIANO CO. *v.* GRAHAM.

Partnership—Agreement for participation in profits — Construction of — Relationship of parties—Joint business—Debtor and creditor.

The plaintiffs sued G. and W. for the price of goods sold to the firm of P. W. G. & Co., and the principal question in the action was whether W. was an actual partner in the firm; the evidence failing to show that he was an ostensible partner, and as such liable to third persons.

Held, that the true test to be applied to ascertain whether a partnership existed was to determine whether there was a joint business, or whether the parties were carrying on business as principals and agents for each other.

G. and W. did not intend to create a partnership between them. G. was carrying on business in the name of P. W. G. & Co., as a dealer in pianos and organs, and, being in want of money, applied to W. for a loan; he did not ask W. to become his partner, nor did W suggest it, but G. proposed to give W. half the profits of his business if W. would lend him $500.

The money was advanced and the following receipt was given by G.:—

Toronto, 13th February, 1888.

"Received from W. the sum of $500 to be used for carrying on the business of dealers in pianos and organs, in return for which I hereby agree to give the said W. one half of the profits of said business, after all expenses have been

paid, including the sum of $10 a week, which is to be charged as wages to G., this arrangement to continue until the first day of January, 1889, and to be continued thereafter if desired by Mr. W. The said W. reserving a claim upon instruments in the store to the value of $500, and he can also at any time demand the said sum upon giving one month's notice, in which case this agreement would be at an end."

W. made a subsequent advance of $500 to G., and on the 14th. April, 1888, a receipt was given for such advance containing an agreement to pay, "over and above the agreement of 13th February, interest at the rate of eight per cent. per annum."

This receipt was at the request of W. signed "P. W. G. & Co., P. W. G., sole partner of said firm."

Held, that these documents did not establish that the business was the joint business of G. and W., or that they were carrying it on as principals or agents for each other; but that they did establish that the true relation was that of debtor and creditor, and W. was therefore not liable to the plaintiffs.

R. S. Neville for plaintiffs.

Coatsworth for defendant West.

BOYD, C.] [March 14.

SPRATT *v.* WILSON.

Trusts and trustees—Investment of moneys left to infants by will—Deposit in savings bank—Liability of trustees for legal interest—Acquiescence of statutory guardian of infants—Costs.

Where moneys are left by will to be invested at the discretion of the executor or trustee, the discretion so given cannot be exercised otherwise than according to law, and does not warrant an investment in personal securities or securities not sanctioned by the court. And

Held, that an executor and trustee who deposited funds so left in trust for infants at three and a half or four per cent. interest in a savings bank did not conform to his duty; and his failure to do so exposed him to pay the legal rate of interest for the money, although he acted innocently and honestly; and the acquiescence of the statutory guardian of the infants not being for their benefit did not relieve him.

Held, also, that the defendant was not entitled to costs out of the fund, but that he should be relieved from paying costs.

Bicknell for the plaintiffs.

H. H. Robertson for the defendant.

Chancery Division.

ROBERTSON, J.] [Feb. 19.

BLACKLEY *v.* KENNY *et al.*

Mortgage to secure future advances—Voluntary conveyance—Subsequent advances—Renewal notes—Land held in suretyship—Giving time—Release—Assignment for benefit of creditors—Trustee representing estate—Proof of judgment in Court of Appeal—Evidence.

A. being indebted to a firm of which B. was a member, in January, 1883, gave him a mortgage as trustee for the firm to secure his indebtedness and all future advances. In September, 1884, A., with the advice and concurrence of B., conveyed the mortgaged property to his wife, subject to the mortgage, which he covenanted to pay off, the mortgage debt being then represented by ten promissory notes. As the notes respectively became due they were retired by B.'s firm from the bank where they had been discounted, payments were made thereon by A., further goods were supplied to him, renewals taken for the balances due, and the old notes were cancelled and given up to A. until the whole ten were thus disposed of. The wife was not consulted about this course of business, nor were any remedies reserved against her.

Held, that this was not payment of the original notes by A., but that as the wife was a surety in respect of the land for the due payment of the notes existing at the time of the conveyance to her, the land in her hands was discharged and released.

Held, also, following *Blackley* v. *Kenny*, 16 A.R., 522, that B. could not charge against the land any advances made after notice of conveyance to the wife.

Plaintiff set up that, in another action of F. as assignee and T. B. & Co. as judgment creditors against these defendants (16 A.R., 276), the conveyance to the wife had been held fraudulent and void as against creditors, and that, although his firm's security might be gone under the mortgage, they had proved their claim as creditors, and were entitled to participate *pro*

rata with the other creditors in the proceeds of the sale of the land.

Held, that as the conveyance was made with the advice and co-operation of the plaintiff, by his conduct he agreed to this alienation of the assets, and must be considered to have consented to take satisfaction out of the property which remained.

Held, also, that although Con. Rule 309 provides for trustees suing and being sued as representing the property or estate of which they are trustees, the Court of Appeal having held that F. had no *locus standi*, he could not be considered as representing the parties who were beneficially interested, and all the claims allowed to F. as assignee for creditors must be disallowed.

Held, also, that the judgment in *F.* v. *K.* (16 A.R., 276), or *T. B. & Co.* v. *K.*, as it was after F. was struck out, was not evidence in this action.

Semble, a certified copy of the certificate of the Registrar of the Court of Appeal as to the result of an appeal is not proper evidence of the judgment in the Court of Appeal.

A. C. Galt for the defendant Kenny who appealed.

Walter Macdonald for the plaintiff.

George Kerr, jr., for Ferguson, the assignee.

ROBERTSON, J.] [March 19.

RE CHAPMAN AND THE CORPORATION OF THE CITY OF LONDON, AND

RE CHAPMAN AND THE WATER COMMISSIONERS FOR THE CITY OF LONDON AND THE CORPORATION OF THE CITY OF LONDON.

Justices of the peace—R.S.C., c. 174, ss 80 and 140—"Person" in R.S.C., c. 1, s. 7, s-s. 22—Prohibition.

The law has not been altered in any way by 32 & 33 Vict., c. 29, s. 28 (R.S.C., c. 174, s. 140), so as to give Justices of the Peace jurisdiction in any matter which they did not have prior to the passing of that statute.

The word "person" in R.S.C., c. 1, s. 7, s-s. 22, includes any corporation to whom the context can apply according to the law of that part of Canada to which such context extends; but as Justices of the Peace never had jurisdiction by the criminal procedure to hear charges of a criminal nature preferred against corporations, such word does not include corporations in cases where a Justice of the Peace is attempting to exercise such a jurisdiction.

A Justice of the Peace cannot compel a corporation to appear before him, their "body" cannot be taken into custody, he cannot proceed *ex parte*, nor can he commit or detain them in custody, nor can he bind them over to appear and answer to an indictment; that being so, he has no jurisdiction to bind over the prosecutor or person who intends to present the indictment.

A writ of prohibition can issue to a Justice of the Peace to prohibit him from exercising a jurisdiction which he does not possess.

J. B. Clarke, Q.C., for the application.

Hutchinson contra.

ROBERTSON, J.]

ANDERSON *v.* HANNA.

Statute of Limitations—Lands—Heirs-at-law—Tenant by the courtesy—Redemption judgment—Mortgage—Power of sale.

Held, that the Statute of Limitations in respect to the recovery of lands does not begin to run against heirs-at-law during the life of the tenant by the courtesy, even though the right of the latter to recover the lands may have become barred by the statute.

Proper judgment where, in such circumstances, the heirs-at-law take proceedings for redemption of the lands during the life of the tenant for life.

Wigle v. *Merrick*, 8 C.P., 307, and *Re Gilchrist and Island*, 11 O.R., 537, followed.

J. H. Ferguson and *O'Brian* for the plaintiffs.

Reeve, Q.C., and *Mills* for the defendants Hanna and Kerr.

Ross for the defendant Fitch and the Western Canada Loan and Savings Company.

Div'l Ct.] [March 1.

LEESON *v.* THE BOARD OF LICENSE COMMISSIONERS OF THE COUNTY OF DUFFERIN *et al.*

License commissioners—Mandamus—Notice of action—R.S.O., c. 194.

Held (affirming FALCONBRIDGE, J.), that a mandamus to compel the defendants to issue a license to the plaintiff would not be granted where the retiring commissioners had not com-

pleted their functions, and their acts were revised by their successors.

Held, also, that a notice of action is necessary before action brought for damages against a board of license commissioners acting under R.S.O., c. 194.

Marsh, Q.C., for the plaintiff.

Delamere, Q.C., for the defendant.

Practice.

ROSE, J.] [Dec. 6th, 1889.

BROOKE *v.* BROWN.

Trusts and trustees—Provisions of will—Implied powers of trustees—Reasonable building lease—Specific performance of agreement for.

The plaintiffs were trustees under a will holding the legal estate in the property devised and bequeathed in trust to maintain themselves and their children, with remainder over to the children upon the death of themselves, with power to absolutely convey the property and to exclude any child from participating in the remainder.

Held, that the plaintiffs had implied power to make all reasonable leases. The plaintiffs made an agreement for a building lease to the defendant of part of the trust estate for twenty-one years, with a provision for compensation to the defendant at the end of the term for his improvements, and the draft lease settled provided that the plaintiffs should at the end of the term pay for such improvements or renew the lease for a further term of twenty-one years.

Held, that the provisions of the agreement and lease were reasonable, and bound the trust estate, and that the plaintiffs were entitled to specific performance.

Matthew Wilson for plaintiffs.

Morson for defendant.

Q.B Div'l Ct.] [March 8.

CONMEE *v.* NORTH AMERICAN CONTRACTING COMPANY.

Costs—Taxation—Counsel fees—Witness fees—Re-opening taxation.

Upon appeals from taxation of costs, the court will not interfere with the discretion of the taxing officer as to the *quantum* or *quoties* of fees; and this rule covers any question of distribution or allotment of charges among different cases or branches of a case.

Where costs were awarded to the plaintiffs upon a postponement of the trial, and the case was not tried till after the taxation of such costs was closed, but it appeared upon appeal from the taxation that some of the witnesses allowed for were not called when the case was actually tried, the taxation was re-opened upon payment of costs, and the taxing officer was directed to reconsider the allowance of witness fees.

C. J. Holman for plaintiffs.

Aylesworth for the defendants.

C. P. Div'l Ct.] [March 8.

LINK *v.* BUSH.

Costs—Set-off—Claim and counter-claim separate and distinct—Rule 1204.

The plaintiff recovered judgment against the defendant, with costs, upon a claim for the value of goods sold under a distress for rent, of which the defendant, the landlord, himself became purchaser; and the defendant recovered judgment against the plaintiff with costs upon a counter-claim for rent and damages to the demised premises. The judgment did not direct any set-off, and, the plaintiff's solicitors having asserted a lien upon the judgment for costs against the defendant, the taxing officer refused to allow a set-off of the costs awarded to plaintiff and defendant respectively.

Held, that the claim and counter-claim were separate, and sit distinct, and the judgments must be treated as judgments in separate actions; and Rule 1204 did not apply to enable the taxing officer to deduct or set off costs.

Under the circumstances of this case the Court (ROSE, J., dissenting) deprived the plaintiff, who was finally successful upon the appeals as to costs, of the costs of the appeals.

M. C. Cameron for plaintiff.

W. H. Blake for defendants.

FERGUSON, J.] [March 21.

ST. CROIX *v.* MCLACHLIN.

Arrest—Order for, signed by judge instead of clerk.

Con. Rule 544 provides that all orders made by a Judge of the High Court in Chambers shall be signed by the Clerk in Chambers.

Held, that an order for the arrest of the defendant signed by the judge who made it, and not by the clerk, was not properly issued.

FERGUSON, J., was also of opinion, upon the evidence, that the defendant was not about to quit Ontario with intent to defraud, and, acting upon both grounds, discharged the defendant from custody.

E. D. Armour for defendant.

Wm. Macdonald for plaintiff.

BOYD, C.] [April 1.

IN RE BRONSON AND CANADA ATLANTIC R. W. CO.

Costs—Expropriation of land by railway company—"Costs incidental to the arbitration."

In expropriation cases the costs should be taxed liberally in favor of the proprietor; but where the statutes mention "costs" only, and not "full costs," costs as between solicitor and client are not intended.

And where a railway company, in expropriating land under the Dominion Railway Act, agreed to pay the land-owners "all costs incidental to the arbitration" had to fix the compensation to be paid;

Held, that the words did not extend to costs as between solicitor and client, nor to costs preliminary to the arbitration.

Arnoldi, Q. C., for land-owners.

Shepley for Railway Co.

Appointments to Office.

COUNTY JUDGE.

Leeds.

Herbert Stone McDonald, of Brockville, Judge of the County Court of the United Counties of Leeds and Grenville, to be a member of the Board of County Judges constituted under R.S.O., c. 51, s. 298, *vice* James Daniell, Esq., Judge of the County Court of the United Counties of Prescott and Russell, deceased.

POLICE MAGISTRATE.

Perth.

Joseph Egbert Terhune, of Listowel, Barrister, to be Police Magistrate in and for the Town of Listowel, without salary.

ASSOCIATE CORONERS.

Essex.

George McKenzie, of Essex, Doctor of Medicine, to be an Associate Coroner in and for the County of Essex.

Wentworth.

James Ross, of Dundas, Doctor of Medicine, to be an Associate Coroner within and for the County of Wentworth, *vice* Allan Holford Walker, M.D., removed from the County.

District of Algoma.

John Carruthers, of Little Current, Doctor of Medicine, to be an Associate Coroner within and for the Provisional Judicial District of Algoma.

DIVISION COURT BAILIFFS.

Kent.

Alexander Cuthbert, of Dresden, to be Bailiff of the Third Division Court of the County of Kent, *vice* John Gillespie, resigned.

Welland.

Elias Augustine, of Humberstone, to be Bailiff of the Sixth Division Courty of the County of Welland, *vice* Adolphus Boyer, deceased.

COMMISSIONER FOR TAKING AFFIDAVITS.

Howard Rumney, of 17 and 18 Basinghall Street, London, England, Solicitor, to be a Commissioner for taking Affidavits within and for the City of London, England, and not elsewhere, for use in the Courts of Ontario.

The Canada Law Journal.

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IT is sometimes said that the standard of duty to which trustees are expected and required to conform is that which would be reasonably expected to regulate the conduct of a careful and prudent man dealing with his own affairs. But there is an important limitation to this rule of conduct which is sometimes lost sight of, and that is that regard must always be had to the express terms of the trust deed. So that a trustee is not at liberty to act as a prudent and careful man would act in regard to his own affairs, untrammelled by the terms of his trust, but the abstract "careful and prudent man," which he must have in his mind's eye, must be one whose powers of action are expressly constrained and limited as his own are. It was from neglect of this consideration that the trustees came to grief in the late case of *Worman* v. *Worman*, 43 Chy.D., 296, noted *ante* p. 209. In that case part of the trust funds had been invested by the settlor upon the security of a second mortgage. The mortgagor got into difficulties, and it became apparent to the trustees that, unless they purchased the equity of redemption, there was a strong probability that the whole amount invested on the second mortgage would be lost. No doubt a careful and prudent man, dealing with his own affairs would, under such circumstances, do as the trustees did in this case, and that is purchase the equity of redemption. By this means they did, in fact, save the trust estate from the entire loss of the fund secured by the second mortgage; but unhappily for them, although they had admittedly done what was best for the estate under the circumstances, the trust deed did not warrant the investment of the trust funds in the purchase of an equity of redemption. Consequently the abstract "careful and prudent man" in this case ought to have suffered the loss without committing "a breach of trust" in order to prevent it. Because the trustees did not pursue this policy of "masterly inactivity" they had to assume a personal liability for the £2,000 of the trust funds which they had thus invested.

THE TORRENS SYSTEM OF LAND TRANSFER.

The annual report of the Master of Titles is an interesting document to all who are interested in the success of the new system of land transfer, of which his office is the practical embodiment.

His report shows a steady increase of transactions. Thirty-eight additional properties, of the aggregate value of $887,761, have been brought under the

Land Titles Act, in the county of York and the city of Toronto during the past year; making the total value of land registered in Toronto up to the end of 1889, taking the value at the time of its registration, $3,691,249. But owing to the increased value which the land has acquired since its first registration, by buildings and other improvements, the present aggregate value of the land is estimated by the learned Master of Tithes to be not less than $10,000,000. Considering the Act has not yet been in force five years, and that registration under it is entirely optional, this is a pretty good showing.

The most valuable parcel of land registered during the year was one of the value of $100,000, for which the office fees (exclusive of the contribution to the Assurance Fund) only amounted to $50.65. Not a very large amount of disbursements, considering the value of the property, and the advantages secured by registration. Another property of the value of $50,000 was registered, for which the office fees only amounted to $18.60. Of course, these fees depend on the state of the title, and a property with a simple title is generally registered at considerably less expense than one where the title is complicated. On the whole we think it must be admitted that in no case have the disbursements been excessive.

About 400 lots appear to have been registered in the districts of Parry Sound, Algoma, Muskoka, Thunder Bay, and Nipissing, during the past year.

The fees of the Toronto office amounted in all to $10,119.78, as against $5,855.70 in 1888, which is a very considerable increase; while the expenses of the office only amounted to $7,215.85, so that after paying the entire expenses of running the office, a very considerable surplus remained in the hands of the Government.

We do not think it should be the policy of the Government to make a revenue from the office beyond what is necessary for its running expenses, and that instead of rolling up a surplus it would be better, in the interest of the public, that the fees of the office should be from time to time reduced so as to cheapen the dealing with land under this system as much as possible.

When people find that not only can they carry through land transactions quicker, and cheaper, and with greater security under this new system, than under the old, so weighty an argument in favour of its general adoption throughout the Province cannot long be withstood.

We have been led to suppose that the establishment of the Toronto office was in the nature of an experiment, and for the purpose of ascertaining on a limited scale whether the Torrens system of registration and transfer can be adopted without inconvenience, and without requiring too costly an expenditure on the part of the land-owner in making the transition from the old system to the new. It appears to us that the experience of the Land Titles office in Toronto has amply demonstrated the feasibility of the process of effecting the required change from the old system to the new, and has also demonstrated that the expenses of making the change is probably not much, if anything, greater than the expense which the land-owner is put to repeatedly upon every transaction in which an investigation of his title is required to be made under the old system.

Those who have had personal experience of the practical working of the new

system of registration, we believe, are thoroughly satisfied with it; but of course it must not be lost sight of, that the facility it affords for expeditiously making title is by no means its leading claim to public acceptance, its principal merit is the security and certainty which it gives to titles; a security and certainty utterly unattainable under the old system.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for April comprise 24 Q.B.D., pp. 361-507; 15 P.D., pp. 37-49, and 43 Chy.D., pp. 313-469.

PRACTICE—INFANT—DISCOVERY—(ONT. RULE 487).

In *Mayor* v. *Collins*, 24 Q.B.D., 361, a Divisional Court composed of Cave and A. L. Smith, JJ., decided that an infant plaintiff suing by his next friend could not be compelled to answer interrogatories for the purpose of discovery. Under the practice in Ontario he would, on the authority of this case, appear to be exempt from examination under Rule 487. It may, however, be remarked that the learned judges base their decision on the practice in Chancery, and that as that practice had not been altered by the Judicature Act it still subsists in England. In Ontario, however, all former practice inconsistent with the Consolidated Rules is superseded, and any unpro vided case is to be governed, not by reference to the former practice, but, as far as may be, by analogy to the Consolidated Rules (see Rule 3), and whether this fact makes any difference in the applicability of this case remains to be seen.

EXECUTOR—CONFLICT OF LAW AND EQUITY—JUDGMENT VOID AGAINST CREDITORS.

Vibart v. *Coles*, 24 Q.B.D., 364, is a decision of the Court of Appeal which cannot be regarded as an authority in Ontario on the main point decided, owing to the difference in the statute law of this Province and that of England; but it may be useful for reference in relation to the provision of the Judicature Act to the effect that where there is a difference between the rules of Law and Equity the latter are to prevail. In this case the defendant, as administratrix, was sued for a debt, and another action by another creditor was subsequently brought, in which judgment was recovered. This judgment, owing to some technical defect, was void as against other creditors; the defendant, however, paid the claim, which exhausted the assets of the estate, and the defendant set up this fact as a defence in the present action. In England there was a conflict between the rules of Law and Equity as to the right of a personal representative under these circumstances. According to the rule of Law, after suit brought by one creditor the personal representative could not, in case of a deficiency of assets, pay another creditor as against the first creditor suing; but in Equity he might do so. It was held in this case that the Equity rule prevailed, and that the defendant was justified in paying the second creditor in full. It was unsuccessfully argued for the plaintiff that the judgment of the second creditor, although bad as

against other creditors, was good between the parties, and therefore merged the debt, and consequently there was no debt to pay; and that, being bad as against creditors, the judgment could not be validly paid. But their lordships in appeal were agreed that a creditor could not be heard to say that the judgment was void, and yet that it was good for the purpose of merging the debt. Of course in Ontario, on a deficiency of assets, it is the duty of a personal representative to pay all creditors rateably, and this case would be no authority for disobeying the express provision of the statute (R.S.O., c. 110, s. 32).

INTERNATIONAL LAW—AMBASSADOR, PRIVILEGE OF—BRITISH SUBJECT AS SECRETARY TO FOREIGN EMBASSY.

In *McCartney* v. *Garbutt*, 24 Q.B.D., 368, a point of international law came up. The plaintiff was a British subject who had been duly appointed and received by the British Government as the secretary of a foreign ambassador, without any reservation that he should continue to be subject to the laws of his own country. His goods were distrained for parochial rates, and the action was brought to recover damages, as for a wrongful distress, on the ground that he was, as a member of the staff of a foreign ambassador, exempt from payment of the rates. Mathew, J., who tried the case, was of opinion that the plaintiff's contention was correct, and that a British subject is entitled to the privilege as well as a foreigner, unless he is received by the British Government upon the express condition that he is to remain subject to the local jurisdiction of his own country.

MANDAMUS TO CORPORATION—DISCRETION, EXERCISE OF, BY PUBLIC BODY.

Reg. v. *St. Pancras*, 24 Q.B.D., 371, shows that where a discretion is vested in a public body, such as a municipal corporation, and in the exercise of that discretion they allow themselves to be influenced by an erroneous view of their legal rights in the matter, the party injured may obtain a mandamus to compel them to reconsider their action. In this case a municipal body were, in their discretion, empowered to grant retiring servants a superannuation allowance, not exceeding a certain rate; but in considering an application for such an allowance the corporation were influenced by the opinion that if any allowance were granted they had no discretion as to the amount, but must give the highest sum the statute authorized, and therefore rejected the application altogether. The Court of Appeal (Lord Esher, M.R., and Fry, L.JJ.) therefore affirmed the mandamus which had been granted by Lord Coleridge, C.J., and Mathew, J., requiring them to reconsider and determine the application.

BUILDING SOCIETY—NOTICE OF WITHDRAWAL BY MEMBER—INSOLVENCY OF BUILDING SOCIETY.

In re Sunderland Building Society, 24 Q.B.D., 394, a question arose as to the rights of members of a building society under a rule of the society enabling members to withdraw, and to receive back payments made by them, with interest. It was held by a Divisional Court (Lord Coleridge, C.J., and Mathew, J.) that the rule only enabled members to withdraw while the society was sol-

vent, or supposed to be so, and that, therefore, notices of withdrawal given, or which matured, after the society was known to be insolvent, though before a winding-up order had been made, conferred no right to priority of payment on the members so attempting to withdraw.

MANDAMUS—REGISTRATION OF STOCK—JOINT OWNERSHIP BY CORPORATION AND INDIVIDUAL.

Law Guarantee Co. v. *Bank of England*, 24 Q.B.D., 406, was an action for a mandamus to the Bank of England to compel the registration of a corporation and an individual as joint owners of certain stock in the public funds. The bank resisted the action on the ground that a corporation and an individual cannot by law hold either real estate or chattels as joint tenants, but only as tenants in common, because they take in different capacities, and there can be no survivorship; and that, therefore, on the death of the individual the bank could not allow the corporation to transfer the stock without investigating the title of the deceased's representatives, and obtaining their concurrence, which was an obligation the bank was not bound to undertake. As was said by the counsel for the bank, the question was one of importance, not only to the bank, but to all public bodies which keep registers of stocks or shares. Mathew, J., sustained the defendant's objection, and refused the mandamus.

CRIMINAL LAW—CONSPIRACY TO PROCURE ABORTION—24 & 25 VICT., C. 100, S. 58—(R.S.C., C.162, S.47.)

In *Reg.* v. *Whitchurch*, 24 Q.B.D., 420, a case was stated by Wills, J., for the opinion of the Court. Whether a woman, believing herself to be pregnant, but not being so, who conspires with others to administer drugs to herself and use instruments on herself with intent to procure abortion, is liable to conviction for a conspiracy to procure abortion. The Court (Lord Coleridge, C.J., Pollock, B., Hawkins, Grantham, and Charles, JJ.) unanimously answered the question in the affirmative. It may be observed that the Act 24 & 25 Vict., c. 100, s. 58 (R.S.C , c. 162, s. 47) only makes it a crime for a woman to use drugs or instruments on herself to procure abortion provided she is with child; but in the case of other persons it is a crime to use drugs or instruments for the purpose of procuring abortion whether the woman is with child or not, and as Hawkins, J., put it, "It is clear that she could not lawfully call in other persons to do that which when done by them is a crime punishable by penal servitude."

CRIMINAL LAW—PREVIOUS CONVICTION—SUMMARY CONVICTION FOR ASSAULT—SUBSEQUENT INDICTMENT FOR SAME ASSAULT.

In *Reg.* v. *Mills*, 24 Q.B.D., 423, the prisoner was indicted for assault, to which he pleaded that he had been summarily convicted for the same offence and discharged on giving security for good behavior, and the Court (Lord Coleridge, C.J., Pollock, B., and Hawkins, Charles, and Grantham, JJ.) were of opinion that the plea was a good answer.

CRIMINAL LAW—LARCENY OF LETTER—POST OFFICE—CAUSING POSTMAN TO INTERCEPT LETTER—LIABILITY AS PRINCIPAL OR ACCESSORY.

The present number is somewhat rich in criminal cases. In *Regina* v. *James*, 24 Q.B.D., 430, the question was whether a person who induced a postman to

intercept and hand over a letter addressed to somebody else, which is in course of transmission through the post office, is guilty of larceny. The Court (Lord Coleridge, C.J., Pollock, B., and Hawkins, Grantham, and Charles, JJ.) were of opinion that he could be convicted, either as principal, or as accessory before the fact, to the larceny by the postman (see R.S.C., c. 145, s. 1.)

PRACTICE—DISCOVERY—ACTION FOR LIBEL.

The *cause celebre* of *Parnell* v. *Walter*, 24 Q.B.D., 441, which was an action against the proprietors of the *Times* newspaper for the publication of the "Parnellism and Crime" pamphlet, and other matters reflecting on the plaintiff, furnishes a little law on the practice of discovery. The plaintiff sought to interrogate the defendant (1) as to the extent of the circulation of the newspapers and pamphlet containing the alleged libel, and (2) as to the names of the persons from whom certain discreditable letters, alleged to be written by the plaintiff, which constituted part of the libel complained of, were obtained; what was paid for them; and what inquiries were made and what steps were taken to test and verify the information supplied to the defendants. The only defence set up was payment into court of 40/-. The defendants admitted a large circulation, but declined to answer further, on the ground that the information required could not be obtained without a difficult and troublesome enquiry, that the answer would involve disclosure of the defendants' business transactions, and that the precise number of copies sold was not material; and they also declined to answer as to the other matters, on the ground that they were irrelevant and not material. On an application to compel defendants to make further answer, it was held by Denman and Wills, JJ., that the defendants were bound to answer approximately as to the extent of the circulation of the alleged libels, but that the other matters were not relevant or material.

PRACTICE—APPEAL—TRIAL BY JURY—JUDGMENT ENTERED AGAINST FINDING OF JURY—JURISDICTION OF COURT OF APPEAL—ORDER XXXIX, R. 1, ORDER XL., RR. 4, 5 (ONT. RULES 789, 798).

In *Rocke* v. *McKerrow*, 24 Q.B.D., 463, the action was tried before a judge and jury, and the jury found a verdict for plaintiff on his claim, and for the defendant on his counter-claim; upon further consideration the judge came to the conclusion that there was no evidence which he ought to have left to the jury in support of the plaintiff's claim, and gave judgment for the defendant upon both claim and counter-claim. The plaintiff appealed to the Court of Appeal under Ord. xl, rr. 4, 5 (see Ont. Rule 798), but the Court of Appeal held that the appeal would not lie, and the plaintiff's remedy was in the Divisional Court under Ord. xxxix, r. 1 (see Ont. Rule 789). The Court of Appeal were of opinion that Ord. xl, rr. 4, 5 (Ont. Rule 798), only applies to a case where the judge at the trial, while admitting the findings of the jury to be correct, nevertheless directs a judgment to be entered which is erroneous in law, and not to a case where a judge sets aside or altogether disregards the findings of the jury.

PRACTICE—MOTION FOR JUDGMENT UNDER ORD. XIV (ONT. RULE 739), AFTER DEFENCE.

McLardy v. *Slateum*, 24 Q.B.D., 504, was an application for judgment under Ord. xiv. (Ont. Rule 739), after a defence had been delivered in ordinary course. Field, J., had set aside a Master's order giving the defendant leave to defend on paying the amount claimed into court, on the ground that the application could only be made before a defence was delivered; but on appeal, Pollock, B., and Wills, J., reversed the order of Field, J., holding that it is not too late to make the application after defence, but that where the application is so delayed, the onus is on the plaintiff to show that the delay is justifiable under the special circumstances of the case.

SHIP—MORTGAGEE—DISCHARGE OF MARITIME LIEN BY MORTGAGEE—RIGHT OF MORTGAGEE TO INDEMNITY FROM MORTGAGOR AND OTHER OWNERS.

The only case in the Probate Division to which it is necessary to refer to here is the case of *The Orchis*, 15 P.D., 38, which was an action by mortgagees of forty-eight sixty-fourth shares of a ship, to recover from their mortgagor and the other co-owners of the ship an amount paid by them to the master, who had brought an action *in rem* against the vessel, and caused her to be arrested. The plaintiffs paid the master's claim in order to get possession under the mortgage. The mortgagors submitted to judgment, but the other owners resisted the plaintiff's claim on the ground that the mortgagees were not entitled to possession of the whole, but only of the shares mortgaged, and were, therefore, under no obligation to pay the master's claim. The Court of Appeal (Lord Coleridge, C.J., Lord Esher, M.R., and Fry, L.J.), however, affirmed the decision of Butt, J., that the claim being one which was a valid charge on the vessel, the mortgagors were justified in paying it in order to get the vessel released, and were, therefore, entitled to recover the amount paid from the owners, within the principle of law laid down in *Edmunds* v. *Wallingford*, 14 Q.B.D., 811.

DAMAGES—DETENTION OF GOODS—MEASURE OF DAMAGES—RIGHT TO DAMAGES AFTER GOODS TAKEN POSSESSION OF BY RECEIVER—LORD CAIRNS' ACT—(21 & 22 VICT., C. 27, S. 2)—(R.S.O., C. 44, S. 53 (10).)

Dreyfus v. *Peruvian Guano Co.*, 43 Chy.D., 316, is an appeal from the decision of Kay, J., on the question of damages, 42 Chy.D., 66, which we noted *ante* vol. 24, p. 554. The majority of the Court of Appeal (viz., Cotton and Fry, L.JJ.) affirmed the decision of Kay. J., but Bowen, L.J., dissented. It may be remembered that the action was brought by the plaintiffs for the delivery of certain cargoes then at sea. The defendants claimed by their pleadings the right to receive the cargoes. Shortly after the writ had issued a consent order was made, by which the defendants received the cargoes on the terms of keeping accounts and undertaking to abide the order of the court as to the proceeds. At this time two of the cargoes had arrived, and others were subsequently received under the order. At the trial the judge held that there had been an unlawful detention of the cargoes, and directed an inquiry as to damages sustained by the plaintiffs by reason of such detention. The defendants appealed from the whole

of this judgment, but subsequently abandoned thir appeal against the portion relating to the inquiry as to damages, and claimed reimbursement of the expenses incurred under the consent order. The appeal was dismissed, and the defendants then appealed to the House of Lords, who varied the judgment by allowing the claim for expenses, but affirmed it in other respects. No application was made to the House of Lords to vary the terms of the inquiry as to damages, which therefore remained as part of the judgment. The chief clerk allowed damages on the footing of there having been a detention of all the cargoes, commencing on their arrival in England. This Kay, J., affirmed, and from his decision the defendants appealed, on the ground that the effect of the decision of the House of Lords was that there had been no wrongful detention, and that nominal damages only should have been given. Both members of the Court of Appeal who affirmed the decision of Kay, J., were constrained to admit that the defendants had put them in a position of difficulty (and as Fry, L.J., termed it, "a cruel difficulty"), by neglecting to appeal from that part of the judgment directing the inquiry as to damages; but as that part of the judgment remained in force and had been affirmed by the House of Lords, they were of opinion that the plaintiffs under the judgment were entitled to the damages assessed. All the members of the Court, however, were agreed that, under Lord Cairns' Act (R.S. O., c. 44, s. 58 (10)), enabling the Court to award damages in lieu of an injunction, the Court has no power to give damages in cases where the injunction is granted before any damages have been sustained, but merely to restrain a threatened injury. Bowen, L.J., who humbly describes himself as "a proselyte at the gate in matters of equity," considered that the certificate of the chief clerk was wrong, because it lumped together all the cargoes, two only having arrived before the consent order was made; as to the others, he thought that it would be consistent with the judgment as it stood to have found only nominal damages, as the possession taken of them by the defendants under the consent order had been declared by the House of Lords not to be wrongful.

Covenant not to carry on particular trade.

Stuart v. *Diplock*, 43 Chy.D., 343, was an action to restrain the defendants from committing a breach of a covenant to carry on a particular trade. The covenant was not to carry on the trade of ladies' outfitting. All that was proved was, that the defendants, who were hosiers, sold four classes of articles, the sale of which was an essential part of the business of ladies' outfitters, but which were also commonly sold by hosiers. Kekewich, J., considered this was a breach of the covenant, but on appeal the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) were of opinion that the *bona fide* sale of certain articles of hosiery which, though an essential and important part, but not nearly the whole of ladies' outfitting, was not a breach of the covenant, there being no covenant not to carry on any part of the business of ladies' outfitters. The covenant in question was not made directly with the plaintiffs, but with the assigns of their lessors, and a question was raised, but not decided, whether in any event the defendants were liable to the plaintiffs for breach of the covenant.

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

HILARY TERM, 1890.

The following is a *resume* of the proceedings of Convocation during the above term:

The following gentlemen were called to the Bar, viz.: *February 3rd*—Arthur Whyte Anglin, with honours and gold medal; Charles Eddington Burkholder, with honours and silver medal, and Robert Elliott Fair; George Smith McCarter, David Hooey, Edmund Sheppard Brown, Duncan Henry Chisholm, Albert Constantineau, William Albert Smith, Walter Allan Skeans, William Edward Fitzgerald, Alfred Edmund Cole, Francis Pedley, William Charles Mikel, Arthur St. George Ellis, Daniel Thomas Kennedy McEwan, Alexander Duncan Dickson, Edward Lindsay Elwood, Albert Edward Baker, Alexander Purdom, Walter Augustus Thrasher, George Harvey Douglas, John Thomas Hewitt, Robert Elliott Lazier. *February 4th*—Richard Vercoe Clement.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz.: *February 3rd*—A. W. Anglin, C. E. Burkholder, J. A. Webster, D. H. Chisholm, A. Purdom, W. A. Skeans, A. E. Baker, A. D. Dickson, G. H. Hutchison, R. S. Chappell, A. S. Ellis. *February 4th*—G. S. McCarter, W. E. Kelly, A. Constantineau, D. Hooey, F. Pedley, H. P. Thomas, H. W. Lawlor. *February 8th*—R. V. Clement, M. C. Biggar, A. E. Cole. *February 14th*—E. S. Brown, W. J. L. McKay.

The following gentlemen passed the Second Intermediate Examination, viz.: R. McKay, F. R. Martin, W. G. Owens, A. H. O'Brien, A. A. Smith, A. J. Anderson, G. R. Wilkinson, J. McEwan, W. P. McMahon, J. H. H. Hoffman, G. D. Grant, A. Bridgman, F. F. Pardee, J. F. Lennox, W. L. McCarthy, W. Mills, A. Crow, D. Mackenzie, S. D. Evans, J. G. Farmer, T. W. Scandrett, F. W. Wilson.

The following gentlemen passed the First Intermediate Examination, viz.: J. C. Cameron, J. S. Robertson, W. B. Taylor, W. L. Wickett, J. R. Milne, P. F. Carscallen, J. E. Varley, E. Harley, H. F. Gault, T. M. Harrison, L. Lafferty, S. D. Schultz, G. G. Duncan, A. B. Jones, W. H. Cairns.

The following gentlemen were entered as Students-at-Law, viz.: *Matriculant Class*—Norman Young Poucher, Bertram Halford Ardagh, John Ashworth, Zachary Richard Edmund Lewis. *Junior Class*—John Alexander Stewart, Geo. Wilson Patterson, William Albert Mace, George Edward Deroche, George Hossack Findlay, James Houston Spence, Charles Arthur Batson, John Thomas White, Ralph McDonald Blackley, William Henry Lovering, James O'Brien, James Dickson, Lewis Frederick Clarry, Allan Norman Cameron. *Articled Clerks*—Edward J. Going, John Charles Elliott, Ethelbert Fletcher Harrison Cross.

Monday, February 3rd.

Convocation met.

Present—Messrs. Ferguson, Foy, Irving, Kingsmill, Macdougall, Mackelcan, Meredith, Morris, Moss, and Murray.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting (Dec. 31st, 1889) were read and approved.

Ordered, that the Finance Committee be requested to report to Convocation upon the direction given that Committee 15th February, 1889, to enquire and report whether further accommodation can be provided in Osgoode Hall for the clothing of practitioners in attendance at the Hall, and to report what, if any, difficulties exist in the way of making such provision.

Mr. Moss, from the Special Committee on Honours and Medals, presented a report, which was adopted.

Ordered, that Messrs. A. W. Anglin and C. E. Burkholder be called to the Bar with honours, and that Mr. Anglin be awarded a gold medal, and Mr. Burkholder a silver medal.

Messrs. Anglin and Burkholder attended, and were called to the Bar, and presented with a gold and silver medal respectively.

Tuesday, February 4th.

Convocation met.

Present—Messrs. Britton, Bruce, Foy, Fraser, Irving, Kingsmill, Macdougall, Mackelcan, Martin, Moss, Murray, and Shepley.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

The petition of George Macgregor Gardner was read, and referred to Messrs. Irving and Hoskin, to whom instructions to oppose Mr. Gardner's bill have already been given.

Mr. Martin, seconded by Mr. Foy, moved the second reading of the rules to amend the rules relating to the Law School as amended, the consideration of which on 31st December, 1889, had been ordered for this day.

The rule was read a second time.

Mr. Martin then moved, seconded by Mr. Foy, that the rules as amended be read a third time.

The rules were then read a third time, were passed, and are as follows:

RULES TO AMEND THE RULES RELATING TO LAW SCHOOL.

164 (*g*). Students-at-Law and Articled Clerks who are exempt from attendance at the Law School, either in whole or in part, may elect to attend the Law School and pass the Examinations thereof in lieu of passing the Examinations under the existing curriculum applicable to Students and Clerks, so exempt in whole or in part, as aforesaid; such election shall be made in writing signed by the Student or Clerk, addressed to the Principal of the Law School, and deposited with him when producing the Secretary's receipt for payment of the Law School fees for the first term to be attended, in conformity with such election, and after such election the Student or Clerk so electing shall be bound to attend the Law School and pass the Examination thereof in the same manner as if originally bound to attend the Law School and pass the Examinations thereof.

164 (*h*). Students-at-Law and Articled Clerks who shall elect to attend the Law School as provided in Rule 164 (*g*), and who would be entitled to present themselves for their First or Second

Intermediate Examination, or for their Final Examination, as the case may be, in any term during any School year term, or before Michaelmas Term then next ensuing, shall upon proof of such attendance, and of passing the Examinations prescribed for the First or Second Intermediate Examination or Final Examination (as the case may be), at the close of such School term or at the Examinations thereof, commencing with the first Monday in September, be allowed such Examination in lieu of their First or Second Intermediate or Final Examination, as the case may be.

164 (*i*). Rules 164 (*d*), 164 (*e*), and 164 (*f*), shall apply to Rules 164 (*g*) and 164 (*h*).

164 (*j*). It is hereby provided and declared to be the true intent and meaning of the Rules heretofore passed respecting the attendance of Students-at-Law and Articled Clerks at the Law School, that every Student or Clerk who is required to attend the School during one term only shall so attend during that term which shall end in the last year of his attendance in Chambers or service under Articles; that every Student or Clerk who is required to attend during two terms shall so attend during those terms which shall end in the last two years respectively of his attendance in Chambers or service under Articles; and that every Student or Clerk who is required to attend during three terms shall so attend during those terms which shall end in the last three years respectively of his attendance in Chambers or service under Articles; and that all Students-at-Law and Articled Clerks, who, in accordance with the rules, shall have duly attended the School during the term which shall have ended in the last year of their attendance in Chambers or service under Articles, shall be entitled to present themselves for their Final Examinations at the close of the said term, notwithstanding their periods of attendance in Chambers or service under Articles may not have been completed at the time of holding such Examinations.

164 (*k*). All Students-at-Law and Articled Clerks admitted upon the books of the Law Society in Michaelmas Term, 1889, and who by virtue of any previous rule may be required to attend the School during the term of 1889-90, shall be deemed to have duly attended during said term, if they shall have attended not less than five-sixths of the aggregate number of Lectures, and four-fifths of the number of Lectures of each series pertaining to the first year of the School course which shall have been delivered subsequent to the date of their said admission.

Saturday, February 8th.

Convocation met.

Present—Messrs. Beatty, Cameron, Ferguson, Foy, Hoskin, Irving, Mackelcan, McMichael, Moss, Murray, Osler, Shepley, and Smith.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

Mr. Murray reported on behalf of the Special Committee appointed to meet and confer with the Provincial Secretary as to the proposed concession in relation to Osgoode Street, referred to in the resolution of Convocation of 29th November, 1889.

The report was read, and ordered to be taken into consideration on Friday, 14th inst., and that the petition and report of the Committee be printed and sent to the members of Convocation forthwith, and that petitioners be informed that it is desirable that the agreement and Act of the Legislature proposed in the report be submitted to Convocation for consideration at the same time, as after Friday next there will not be a meeting of Convocation for three months, and that members of Convocation be informed that the report will be considered on Friday next.

Mr. Hoskin, in pursuance of an order of 31st December, 1889, in the matter of Mr. J. P. McMillan, reported that he had made application to Mr. Justice

Robertson for an order amending the order striking Mr. McMillan off the rolls, upon which application the following judgment was given:

"Mr. Hoskin, Q.C., having applied to me to amend an order made by me on 16th March, 1889, whereby one John P. McMillan, a solicitor, and a member of the Law Society of Upper Canada, was ordered to be struck off the roll of solicitors, so as to include the further order: 'That such order shall be transmitted by the proper officers of this Court to the Treasurer of the Law Society,' in terms of the Rule 119 of the Society; I am of opinion that such order, having been acted upon, cannot be amended, unless by another application made in due form, upon notice to the party affected thereby."

January 8th, 1890. (Sd.) THOMAS ROBERTSON.

Upon motion of Mr. Hoskin, seconded by Mr. Cameron, it was ordered that the solicitor of the Society be instructed to take the necessary steps to have the order referred to amended.

Mr. Hoskin, from the Discipline Committee, reported in the case of the complaint of Mr. Adam Good against Mr. W——, that this matter, so far as it relates to negligence, should be tested in a court of law, and not be investigated by this committee, and they submitted to Convocation for its consideration whether the other charge, viz., that of instigating litigation, should be proceeded with.

The report was received, and Convocation ordered that no further action be taken, inasmuch as the charge of negligence is the only charge specifically made, and not a matter requiring the action of Convocation.

Ordered, that upon a special rule being passed repealing for this case the rule requiring notice, etc., prior to call, the application of Sir John S. D. Thompson, K.C.M.G., a member of the Bar of Nova Scotia, for call to the Bar of this Province, be granted, and that upon the production to Convocation of a certificate of call to the Bar of Nova Scotia, and the testimonials required by sub-sec. 5 of sec. 1 of chap. 146, R.S.O., Sir John S. D. Thompson, K.C.M.G., now Minister of Justice, be called to the Bar of this Province, and that the fees payable upon such call be remitted or waived by the Society.

Leave was granted to introduce a special rule.

Mr. Osler, in absence of Mr. Robinson, moved, seconded by Mr. Cameron, the following Special Rule:

That Rule 207, sub-heads 1 and 3, Rules 209 and 210, and any other Rule conflicting with the above resolution be suspended and dispensed with in the case of Sir John S. D. Thompson, K.C.M.G., on his application for call to the Bar of Ontario.

The rule was introduced, read a first and second time, and by unanimous consent rule 21 was suspended, and the rule was read a third time.

The Secretary laid on the table a return of solicitors who had paid their annual fees up to Michaelmas Term, 1890, and also of the solicitors who had failed to pay in time.

Ordered, that it is desirable that a correct list of Benchers, taken from the journals, from the foundation of the Society to the present time, be prepared, and that Mr. Read, Q.C., be requested to prepare the same.

Ordered, that Mr. Grasett do check the Roll of Barristers and Solicitors with Mr. Hardy in the compilation of his authorized list, and that Mr. Grasett be authorized to sign the same certifying to its accuracy.

Friday, February 14th.

(Subject to confirmation at next meeting of Convocation.)

Convocation met.

Present—Sir Alexander Campbell and Messrs. Beatty, S. H. Blake, Britton, Bruce, Cameron, Ferguson, Foy, Fraser, Guthrie, Hoskin, Irving, Lash, McMichael, Martin, Meredith, Morris, Moss, Murray, Osler, Purdom, Robinson, and Shepley.

The minutes of last meeting were read and approved.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

Mr. Morris, from the Library Committee, presented the report of that committee on the application of the Hamilton Law Association for new editions of students' books, recommending that the Association be forthwith supplied with the following books: One copy of Dart on Vendors, 1888; one copy of Armour on Titles, 1887; one copy of O'Sullivan's Government in Canada, 1887; one copy of Smith on Contracts, 1885. And that the Secretary of the Association be informed that there is not any new edition of Smith's Mercantile Law, although one is expected, but that an order has been given for such new edition when published. Referring to Blackstone's Commentaries by Kerr, this work is not contained in the new curriculum adopted by the Law Society, and need not therefore be supplied.

The Committee further recommended that the Secretary of the Hamilton Association be informed that in pursuance of the recommendation of the Special Committee adopted by Convocation of 21st May, 1887, in future the renewal of the set of students' books supplied them must be assumed by the Hamilton Association.

The committee also beg leave to report that they have received an application from the junior library assistant asking for an increase of salary, and your committee beg leave to recommend that his salary be increased to eight hundred dollars per annum, to take effect from this date.

On behalf of the committee. (Sd.) ÆMILIUS IRVING, *Chairman.*

February 4th, 1890.

The report was adopted, and ordered accordingly.

Mr. Murray presented the report of the Special Committee, dated February 28th, on the subject of the closing of Osgoode Street.

Mr. Murray moved that the report be adopted. *Lost* on a division.

Mr. Shepley presented the report of the Editor to the Reporting Committee, as follows:

Toronto, 14th February, 1890.

DEAR SIR,—I have to report that in the Court of Appeal Mr. Grant's arrears have been finished, and the digest of his last volume will be ready in a few days. Mr. Cassels has eleven cases all of the 14th January, so that all judgments in the Court of Appeal to the end of 1889 have been published. In the Queen's Bench there are seven unreported cases, all of December, six of which are ready to issue.

In the Common Pleas there are twenty-six, of which two are of September, one of November, fourteen of December, and nine of January.

In the Chancery Division Mr. Lefroy has sixteen, two of October ready to issue, one of November revised, seven of December, and six of January.

Mr. Boomer has two, one of October ready to issue, and one of November revised.

All the Practice cases to the end of 1889 have been published—five of January are unreported.

. I am, yours truly. (Sd.) J. F. SMITH.

B. B. OSLER, ESQ., Q.C., *Chairman.*

Mr. Murray, from the Finance Committee, reported that the preliminary engagement of Miss Wynn as telegraph and telephone operator is finished, and moved that she be now appointed at a salary of thirty-six dollars a month.

The report was adopted, and ordered accordingly.

Mr. Lash gave notice that at the next meeting of Convocation he would move, "That it is expedient to consent that the Dominion Government have certain privileges over Osgoode Street, in rear of Osgoode Hall grounds, in connection with the drilling of volunteer troops thereon, and that Messrs. Murray, Shepley, Foy, Irving, Robinson, and the mover, be a Special Committee to prepare and submit to the next meeting of Convocation a draft of such agreement and statutes as, after conference with the Government and municipal authorities, they may think should be entered into and passed for the purpose of granting such privilege and protecting the interests of the Law Society."

The letters from Messrs. Thornberry & Co., F. A. Barr, and F. Nicholls, on the subject of electric lighting, were read and referred to a committee consisting of the Library Committee, and Messrs. Osler, Mackelcan, Murray and Lash.

The following telegram was received from Sir John S. D. Thompson, the Minister of Justice, from Sharbot Lake, on the C.P.R.:

To J. H. Esten, Osgoode Hall:

In consequence of train from Montreal breaking down, Ottawa car has been detained at Smith's Falls until a few moments ago, therefore we cannot reach Toronto until four o'clock.

(Sd.) JOHN S. D. THOMPSON.

Convocation thereupon adjourned until five o'clock p.m.

5 p.m. Convocation met pursuant to adjournment.

Present—Messrs. Beatty, Britton, Cameron, Moss, Murray, Osler, Purdom, Robinson, Shepley, and Mr. Irving, the Chairman of the day.

Sir John Thompson, Minister of Justice and Attorney-General of Canada, having presented his Certificate of Call to the Bar of Nova Scotia, under the seal of the High Court, dated the 7th February, 1890, and also the Certificate of Sir Alexander Campbell, K.C.M.G., Lieutenant-Governor of Ontario, and a former Minister of Justice and Attorney-General for Canada, that he has known him for many years, and that he is a gentleman of good character and conduct, it was ordered that Sir John Thompson be called to the Bar of Ontario.

Sir John Thompson thereupon attended, and was called to the Bar accordingly, and was subsequently presented to the Judges of the Common Pleas Division of the High Court of Justice.

Sir John Thompson afterwards took his seat as an ex-officio Bencher.

Convocation adjourned.

Correspondence.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—There is a distinct violation of good taste creeping into the public press. I refer to the calling of a member of the legal profession "Lawyer So-and-So." Like many a short cut in language, it offends against custom, euphony, and the dignity of the profession. Fancy calling one of the much-admired leaders of the Bar, "Lawyer Robinson!" It smacks too much of Texan freedom for my taste. What do you think, Mr. Editor?

Peterborough, April 25. J. H. B.

Notes on Exchanges and Legal Scrap Book.

THE ENGLISH CEREMONIAL ON "TAKING SILK."—It will be interesting to many members of the profession, and especially to those who are now Queen's Counsel, and to all who expect to "take silk," to read the following letter of Mr. Locock Webb, Q.C., to Mr. Hodgins, Q.C., on the English ceremonial observed on a barrister becoming a Queen's Counsel. Mr. Webb is a Queen's Counsel of eminence, and one of the leaders of the English Bar, and a Bencher of the Middle Temple, and is well-known as the author of a work on the "Practice of the Supreme Court, and on Appeals to the House of Lords." The letter, which we publish by the permission of Mr. Hodgins, was written in reply to one from that gentleman to Mr. Webb, requesting information concerning the oath taken by Queen's Counsel, and other matters which are fully explained in Mr. Webb's most interesting letter. We have made inquiries from old members of the Bar, and have also examined the old Term Books of the Court as to whether the Queen's Counsel's oath was ever administered in this country, but our inquiries and searches have resulted in a negative.

Some years ago we published an article written for this Journal by Mr. Hodgins, on the "Right of Queen's Counsel to defend Prisoners," (17 CANADA LAW JOURNAL, 74), in which the duty imposed by the office on Queen's Counsel not to take cases against the Crown, was fully explained and illustrated from precedents in the English Courts. A barrister accepting the office of Queen's Counsel is supposed to accept a standing retainer from the Crown, and it is therefore inconsistent with that retainer to take a brief against the Crown without the consent of the executive. The point may be illustrated by the practice and rule which prevent the standing counsel of any of our great railway or other corporations taking briefs against the corporation without the consent of the directors.

The following valuable letter of Mr. Locock Webb's will be read with great interest by all members of the legal profession in Canada:—

4 Elm Court Temple, 27th March, 1890.

DEAR SIR,—You are quite right, the practice of swearing in the Queen's Counsel here continues. But I could meet with the form of the oath nowhere, until I turned up the Oaths Com-

mission Report of 1867. As you may possibly not have that blue book in your library, an extract is enclosed. I am unable to refer you to any other book where the oath is published.

Touching your questions. From very ancient times (probably as far back as Alfred) it has been the custom for the Lord Chancellor and judges to take an oath on appointment, and so it was with the old Sergeants. Upon the original creation of King's Counsel (said to have been first made in 1663, by the appointment of North, aftewards Lord Keeper), it would seem an oath was in like manner taken from the King's Counsel. The practice came to be established by the authority, probably, of the king himself originally, and to have grown into a custom.

I am unable to find any statute requiring the oath, and I believe there is no such statute. With us, at home, you know custom has really the weight of common law, unless controlled by statute; and no Act of Parliament, therefore, was required for authorizing the oath.

"The Promissory Oaths Act, 1868" (31 & 32, Vic. c. 72), which passed the year after the Commissioners' report was submitted to Parliament, is silent as to the Queen's Counsel's oath, and consequently the custom remained in force in that respect.

I have added a note to the extract as to the ceremonial here of calling an utter barrister "within the bar." I am most pleased to answer your questions to the best of my power.

It always delights us to welcome "home" our Canadians, and especially in our Inns of Court our brother Q.C.'s. I am happy to learn that you and your friends were pleased with your visit to my own Inn *domus*. Please remember me kindly to them, and say that I trust your visit to the Middle Temple will be renewed.

In Old England we were sorry, indeed, to learn of the destruction by fire of your splendid Toronto University.

Very faithfully yours,

LOCOCK WEBB.

THOMAS HODGINS, ESQ., Q.C., Toronto.

THE following is the Oath taken by Queen's Counsel in England:—

"Ye shall severally swear that well and truly ye shall serve the Queen as one of her counsel learned in the law, and truly counsel the Queen in her matters when ye shall be called, and duly and truly minister the Queen's matters and sue the Queen's process after the course of the law and after your cunning. Ye shall take no wages nor fee of any man for any matter against the Queen where the Queen is party*. Ye shall duly in convenient time speed such matters as any person shall have to do in the law against the Queen, as ye may lawfully do without long delay, tracting, or tarrying the party of his lawful process in that that to you belongeth. Ye shall be attendant to the Queen's matters when ye be called thereto. As God you help, and by the contents of this book."

The following is the ceremonial observed on "Taking silk":—

The new Queen's Counsel meet by appointment at the House of Lords, and are ushered into the Lord Chancellor's private room—entering according to seniority of call to the Bar. The Lord Chancellor remains seated at his table, and the Queen's Counsel form a semi-circle opposite.

The Clerk of the Crown then reads the oath, and the Queen's Counsel repeat the words after him.

The Lord Chancellor then rises from his seat and presents with his own hand to each of them in succession his Patent, and sometimes shakes hands and says a few kinds words to any old friends—formerly his associates at the Bar. The ceremony is then over, excepting the formal calling within the Bar.

The Queen's Counsel meet again by appointment adjoining the Law Courts,

form in procession, and enter on the left hand of the principal court first—the senior leading—and stands by the inner bar. The judge then addresses him thus: "Mr. A. B., Her Majesty having been pleased to appoint you one of Her Majesty's counsel, learned in the law, you will take your seat within the Bar."

He then enters within, bends to the judge, then bends to the Q.C.'s within the Bar, who all rise and return the compliment. He then turns right round and bends to the outer Bar, who in their turn all rise.

He then takes his seat, and the judge again addressing him, says: "Mr. A. B., do you move?" Whereupon he rises and bends, and the judge returns the bow; and then Mr. A. B. moves off on the right hand side of the court.

And this ceremonial is repeated in each of the Superior Courts, and thus ends the ceremony of "taking silk."

Mr. Webb remarks that it is customary in any Crown case for the Q.C. retained contra to apply for a license, which is granted, as of course, upon payment of some small fee. The Oaths Commissioners recommended that in altering the form of this oath the words "with license of Her Majesty" should be inserted where marked *.

THE LORD CHANCELLOR OF ENGLAND.—Hardinge Stanley Giffard, Baron Halsbury, the present Lord Chancellor of England, is the third son of the late Stanley Lees Giffard, LL.D.,—for more than a quarter of a century the editor of the *Standard* newspaper,—and was born in 1825.

"Early Struggles," "Silk," "Office," "Knighthood," and "The Woolsack,"—these are the necessary chapters in the biography of a Lord Chancellor; and the external facts in Lord Halsbury's career range themselves under the usual headings naturally and appropriately. He was admitted as a student of the Inner Temple in 1847, was called to the bar in 1850, assumed the silk robes of a Queen's Counsel in 1865, was raised to the Solicitor-Generalship and received the honour of knighthood in 1875, and just ten years later became Lord Chancellor. After having twice contested Cardiff unsuccessfully in the Conservative interest, Lord Halsbury, then Sir Hardinge Giffard, Solicitor-General, was elected member of Parliament for Launceston in 1877, and continued to represent that constituency till his promotion to the woolsack.

The traditions of the Temple declare the attainment at once of strictly professional and of political or administrative eminence to be well-nigh impossible. There are lawyers and there are politicians in the High Court of Justice; but the politicians are not lawyers, and the lawyers, for the most part, are not politicians. Sir William Harcourt, for instance, is a powerful parliamentary debater and an astute party leader, but his ignorance of law is a standing joke in the House of Commons. Sir Horace Davey, again, has forgotten more law than Sir William Harcourt ever knew, and will take his place in legal history with Benjamin and Selborne and Cairns, but many third-rate politicians are greater than he. Sir Henry James alone among living advocates has taken a double first, in politics and in law. His defence of Mr. Justice Keogh in the famous

Galway Election Petition debate; his apostrophe on the same occasion to the Archbishop of Tuam,—"I tell thee, proud prelate of the West," etc.; his management of the Judicature and Corrupt Practices Act; his reply to Mr. Goschen on the second reading of the Franchise Bill of 1884, and his speech in the course of the Home Rule debates in 1886,—render intelligible the doubt which Sir Henry James' friends have all along entertained whether his proper place was the Cabinet or the Bench, and explained the ready credence accorded in 1880 to the rumour that he was going to the Home Office as Secretary of State.

Now, Lord Halsbury's reputation is not parliamentary. He has engineered several important measures, but so in their day did Baron Huddleston and Sir John Coleridge. Perhaps the incident best known in the Chancellor's political career is the delay in his admission to the House of Commons in 1877, caused by the writ certifying his election having been misplaced! Neither is Lord Halsbury an eminent lawyer in the strict sense of the term. No conscientious biographer would put him on the same plane with Sir Richard Webster or Mr. Henry Matthews, not to speak of even greater names than theirs. He has never done, and could not do, such splendid judicial work as Sir James Hannen has quietly achieved in his dingy and ill-ventilated court. Lord Halsbury, his official position notwithstanding, must ever be third best in a tribunal to which the Earl of Selborne and Lord Bramwell belong.

Again, the Lord Chancellor's reputation is not derived from any triumphant victory over early difficulties. He was neither a Scotsman nor a poor clergyman's son. He was not called upon to write paragraphs for newspapers, or to haunt the theatres as a dramatic critic, or to "coach" idiots for a profession which they will only bring into contempt. We must seek elsewhere for the sources of his eminence. Lord Halsbury has risen to the woolsack from the Old Bailey. He has never been Attorney-General; and he was engaged in nearly every *cause celebre* tried in the English Courts from 1864 to 1885.

It may be interesting to run rapidly over the chief incidents in the Chancellor's forensic career. In 1864 Franz Muller was tried for the murder of an English gentleman, Mr. Briggs, on the North London Railway. The excitement to which the case gave rise can still be faintly traced in the pages of the "Annual Register," where the best account of it is to be found. Muller escaped to New York, was promptly arrested on his arrival, brought back to England, tried, condemned, and duly executed, in spite of the foolish efforts of a German Protection Society and of the King of Prussia (who telegraphed to Queen Victoria, requesting her personal intervention) to procure a reprieve. Now, in this case Mr. Hardinge Giffard, along with the Solicitor-General, Sir R. P. Collier, and Mr. (now Sir James) Hannen, conducted the prosecution.

Two years later, "the London tailors"—Druitt, Partridge, and the rest—were tried before Baron Bramwell for picketing and intimidation during the great strike. Mr. Coleridge, Q.C., the present Lord Chief Justice, Sergeant Parry, and Hardinge Gifford, defended the prisoners; but the law was too strong for the advocates, and a conviction followed. "I lay it down," said Baron Bramwell to the jury, "without hesitation, that whenever two or more persons

agree that they will by molestation, annoyance, threats, intimidation, or any other manner of coercion,—not by persuasion,—influence the minds, wishes, and wills of others as to the modes in which they should or should not bestow their labour, the persons who so act are guilty of a criminal offence."

In 1868 came the Fenian trials. Here the Attorney-General (Sir J. B. Karslake), the Solicitor-General (Sir Balliol Brett, now Lord Esher, Master of the Rolls), and Mr. Giffard appeared for the Crown; but only a single conviction was obtained. Montague Williams and Edward Clarke, now a Knight and Solicitor-General, had been retained for the defence.

Mr. Giffard was a member of the Welsh Circuit, and at the Glamorganshire Assizes held at Cardiff in July, 1869, he was pitted against Mr. Grove, Q.C., in the strange case of "Esther Lyons." This was an action raised by Barnett Lyons, a Jew and a money-lender in Cardiff, against a Welsh dissenting minister and his wife, for having enticed away his daughter Esther with the view of converting her to Christianity. Mr. Grove was an eminent man of science; his name is associated with a galvanic battery of some notoriety; he is the author of a work on the correlation of physical forces; he enjoyed the reputation of being the best patent lawyer of his day; he was for many years a Justice of the High Court, and is now a Privy Councillor. But as a *nisi prius* advocate he was helpless in the hands of Hardinge Giffard; and the money-lender got a verdict for £50, to the surprise and against the charge of the presiding judge, Mr. Baron Channell.

In the same year Giffard, together with Karslake, Coleridge, Hawkins (now a Judge of the High Court), and other celebrities, successfully defended the Directors in the famous Overend Gurney prosecution. On the first Tichborne trial he appeared, with Sergeant Ballantine, for the plaintiff, who was afterwards represented by Dr. Kenealey.

In 1871 Boulton and Park were tried for frequenting theatres and other places of public resort in women's clothes. Hardinge Giffard prosecuted with the law officers of the day and Sir Henry James, but failed to secure a conviction. In Belt. *v.* Lawes Sir Hardinge Giffard was matched against Charles Russell, now the unchallenged leader of the common-law bar. Not without dust and heat do such rivals engage,—

But Hardinge Giffard remained master of the field. The plaintiff, for whom he appeared, got £5,000 damages; and the Court of Appeal declined to disturb the verdict, at least to his disadvantage. Belt *v.* Lawes was an action of libel. The defendant had alleged that certain busts and pieces of sculpture attributed to Mr. Belt, and claimed by him as his own, had in fact been executed by persons in his employ. The case was tried before Mr. Baron Huddleston at Westminster; the trial lasted for forty-three days, and the present Attorney-General shared in the defeat of Sir Charles Russell.—*A.W.R., in The Green Bag.*

DIARY FOR MAY.

1. Thu....St. Philip and St. James.
2. Fri.....J. A. Boyd 4th Chy., 1881.
3. Sat.....Mr. Justice Henry died, 1888. Last day for filing papers and fees for final exam.
4. Sun....*Fourth Sunday after Easter*
6. Tues...Supreme Court of Canada sits. Lord Brougham died 1868, æt. 90.
10. Sat.....Indian Mutiny 1857.
11. Sun....*Rogation Sunday.*
13. Tues...Court of Appeal Sits. General Sessions and County Court Sittings for trial in York begin. Solicitors' Examination.
15. Thu....Barristers' Examination.
18. Sun....*Sunday after Ascension.*
19. Mon....Easter Term commences. High Court Justice Q.B. and C.P.D. Sittings.
21. Wed....Confederation proclaimed 1867. Lord Lyndhurst born, 1772.
24. Sat.....Queen Victoria born 1819.
25. Sun....*Whitsunday.* Princess Helena born 1846.
27. Tues....Habeas Corpus Act passed 1679.
28. Wed....Battle of Fort George 1813.
29. Thu....Restoration of Charles II., 1660.

Reports.

IN THE THIRD DIVISION COURT OF THE COUNTY OF ONTARIO.

WILCOX *v.* COLTON, LAING, AND MAHONEY.

Claimant's chattel mortgages—After acquired property—Erroneous statement of consideration—R.S.O., c. 125.

When a chattel mortgage contains no agreement to charge afte acquired property, a second chattel mortgage upon such property intended to be collateral to the renewal of the first cannot be supported, the more because on its face it is not shewn to be collateral, but apparently in respect of a new advance.

[Whitby, April 8.

Interpleader. The claimant's case rested upon two chattel mortgages. The first was dated 13th January, 1888, and properly filed and renewed in 1889 and 1890, securing $381.20. Nothing was contained therein affecting after acquired property.

The second was dated 6th January 890, properly filed, securing $263.

It was shewn or admitted that the last mortgage was given to secure the unpaid balance of the first, and was intended to be collateral to its renewal, but did not so state, and on its face appeared to be given in consideration of a new advance. It included various chattels not set out in the first mortgage, and excluded certain others which the mortgagor had in the meantime sold or exchanged.

DARTNELL JJ.—There is no question as to the sufficiency or *bona fides* of the first mortgage, it having been given for monies actually advanced to the mortgagor by the claimants for the purpose of carrying on certain lumbering operations on their behalf.

It remains to be considered whether the claimants can hold the after acquired property under their second chattel mortgage.

It was conceded, and I think correctly, that there is no decision governing the point.

A conclusion can only be arrived at by applying the principles of other rulings to the matter now in question.

It appears that an agreement as to future chattels gives no legal rights, and does not pass the after acquired property ; but that in a proper case it can be made effectual on the ground that a Court of Equity will enforce it as attaching upon that property when it is ascertained. *Clark* v. *Scottish Imperial Insurance Co.*, 4 S.C.R., 709. And also that the Chattel Mortgage Act was not intended to cover agreements creating equitable interests in non-existing and future acquired property. *Banks* v. *Robinson*, 15 O.R., 618.

"Effect can only be given to words in a conveyance as they are found, and the Court cannot carry out the intention of the parties under such instruments if the words do not shew *verbatim* such intention," *Tapfield* v. *Harman*, 12 U.C.C.P., 311.

"If it be the intention of the parties to affect future acquired property, that intention must clearly appear on the face of the deed," *Mason* v. *McDonald*, 25 U.C.C.P., 439.

In this view the claimants cannot hold that the after acquired property, cannot be held as against the defendants' execution creditors, and the second mortgage not being given in pursuance of any agreement contained in the first mortgage cannot aid the claimants, in addition to which there is the fact that the consideration as expressed was not true, and that the mortgage was given for an antecedent debt by a mortgagor, insolvent with the knowledge of the claimants.

My judgment, therefore, is for the claimants in respect of the chattels now existent, contained in their first mortgage, and against them in respect of those acquired by the mortgagor after its execution. Costs of interpleader to be paid out of proceeds of sale.

IN THE FOURTH DIVISION COURT OF THE COUNTY OF ONTARIO.

PROVINCIAL PROVIDENT INSTITUTION *v.* TODD.

Benefit Society—Waiver of forfeiture—Liability for assessments.

The forfeiture clause in the benefit certificate being for the protection of the insured, and the contract being voidable, not void,

Held, that the demand for further assessments after the certificate had become forfeited was a waiver of such forfeiture, and that a member could not withdraw without paying all dues and assessments to the date of the receipt by the Institution of his notice of withdrawal.

[Whitby, March 27.

This action was brought to recover the amount of two assessments. which were claimed to be due by the defendant to the plaintiffs, amounting to $3.40.

The defendant was a beneficiary in the plaintiff's institution for the sum of $2,000 so long as he kept up certain payments according to their rules.

On the 15th of November last certain semi-annual dues became due, and should have been paid on that date. On the same date an assessment was made, which the defendant had thirty days to pay, under the condition 7 of the certificate issued to him, and the concluding part of this condition reads : "Default in the payment of assessments in the time and manner specified in this condition shall, *ipso facto*, suspend the member and void this certificate."

The defendant did not pay either the dues or assessments until the 17th day of January, when he forwarded the money due by him up to the 15th of December, 1889, and also his certificate, with notice of withdrawal, and requested to be freed from any further liability. This he did immediately upon the receipt of the notice calling for two further assessments. The plaintiffs' claim that on the 15th day of January two other assessments were called for, that the defendant became liable therefor, and it is for this assessment that they brought this action; they claiming that although they had the right to suspend defendant on the 15th day of December they had not done so.

Condition 9 reads as follows : "That the member may withdraw and be freed from further liability to the Institution at any time or during the thirty days given in said notice of assessment, or the sixty days given for reinstatement, upon notifying the secretary (by registered letter) of his or her intention to withdraw from the Institution, and paying all assessments and dues, and any or all claim or claims due the Institution at the date of the receipt by the Institution of such registered letter."

DARTNELL, JJ.—If the defendant had remitted the money on the 15th of December which he forwarded on the 17th of January, it is clear that the company would have been forced to accept it and free him from any further liability. There is but little question that if the defendant had died between the 15th day of December and the 15th day of January the plaintiffs would not have been liable to pay the amount of his certificate, as they would probably have claimed that it was void and that he was suspended. The authorities seem to show that although breach of the conditions make the contract void, that it is really only voidable, and the insurers may waive the default and still be liable. It seems to me that in claiming from and notifying the defendant on the 15th of January last, they waived any past forfeiture and still recognized him as a member, and if the defendant died within thirty days thereafter his beneficiary would have an action against the plaintiffs. Under Condition 9 the defendant "could only withdraw and cease to be a member by payment of all assessments and dues, and any or all claim or claims due the Institution at the date of the receipt by the Institution of such registered letter."

The defendant did not *entirely* comply with this condition. He forwarded by registered letter the notice required and money enough to cover the "claim" of the plaintiffs for past assessments and dues, but did not send enough to cover the assessments which had accrued since November, 1889. I think he has failed fully to comply with the terms of the Condition, and is not relieved from the payment of these assessments.

When a death claim arises the plaintiffs make an assessment upon the members sufficient to cover the sum payable, and if a large number of members withdraw without paying up such assessment, the sum payable will fall short, and the continuing members will have to be called upon for an additional sum to make up the deficiency.

The case of Horton *v.* Provident, 16 O.R.,

832, affirmed by the Divisional Court, 17 O.R., 38, and now before the Court of Appeal, and cited for the defendant, is an authority against him. There it was held that the contract was for the insurer's protection, and was voidable, not void, and that they could and did waive the forfeiture. In Wells *v.* Foresters, 17 O.R., 317, it was held on the facts that there had been no waiver and the insurers were not liable. In a recent case of Redmond *v.* Canada Mutual (not reported), Mr. Justice McMahon held that the fact of previous waiver of forfeiture by the receiving of dues long in arrear was not a bar to a defence setting up a forfeiture by non-payment of subsequent dues.

All these cases lead to the conclusion that the forfeiture clauses are for the protection of the beneficiary, and can be waived either impliedly or by express act.

I am informed that this is a test case, and I have been asked to give a considered judgment. I find for the plaintiffs for $3.40 and costs.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

COURT OF APPEAL.

[March 4.

REGINA *v.* WATSON.

Constitutional law—Criminal law—Criminal procedure—B.N.A. Act, s. 91, s-s. 27—51 Vict., c. 32 (O.)—52 Vict., c. 15 (O.)

The "Act to provide against frauds in the supplying of milk to cheese or butter manufactories," 51 Vict., c. 32 (O.), does not deal with criminal law within the meaning of s. 91, s-s. 27, of the B.N.A. Act, but merely protects private rights, and is *intra vires.*

So also the "Act respecting appeals on prosecutions to enforce penalties and punish offences under Provincial Acts," 52 Vict., c. 15 (O.), is not legislation dealing with criminal procedure within the meaning of that subsection, and is *intra vires.*

Judgment of the Queen's Bench Division, 17 O.R., 58, reversed.

E. Blake, Q.C., and *Irving*, Q.C., for the appellant.

E. B. Edwards for the respondent.

[March 4.

SINDEN *v.* BROWN.

Justice of the Peace—Summary conviction Fine—Distress—Part payment—Imprisonment—Notice of action—R.S.C., c. 178, ss. 60, 61, 62, 63, 64, 65, 66, 67—R.S.O. (1887), c. 73, s. 14.

The defendant was convicted under the Canada Temperance Act and was adjudged to pay a fine and costs, to be levied by distress if not paid forthwith, and in default of sufficient distress to be imprisoned, etc. The defendant paid the costs but not the fine, and a distress warrant was issued against him, and nothing being made under this warrant he was committed.

Held, that the committment was illegal.

Trigerson v. *Board of Police of Cobourg*, 6 O.S., 405, approved and followed.

If a portion of the penalty is paid before committment, the amount paid must be restored before the alternative punishment is resorted to.

Held, also, that the magistrate having, in the honest belief that he was acting in the execution of his duty as such, issued the warrant of committment after part payment of the penalty, he was, though acting without jurisdiction, entitled to notice of action, and that, no notice having been given, the action failed.

Judgment of the Common Pleas Division, 17 O.R., affirmed on other grounds.

McCarthy, Q.C., and *DuVernet* for the appellant.

Aylesworth for the respondent.

[March 4.

MARSHALL *v.* MCRAE.

Master and servant — Wrongful dismissal—Right to dismiss — Grounds of dismissal—Exercise of right—Forfeiture of property.

The plaintiff, who was the inventor of a certain machine, and had assigned certain patents therefor to the defendant, agreed to obtain patents for certain improvements made by him upon the machine, and to assign them to the

defendant as soon as obtained, who in consideration thereof agreed to employ the plaintiff for two years from the date of the agreement for the purpose of demonstrating and placing the patents on the market, and to pay him a certain sum for salary and also his expenses, and the plaintiff and defendant were to share the profits in certain proportions.

The tenth clause of the agreement was as follows:

"It is further agreed that the party of the first part (the defendant) is to be the absolute judge as to the manner in which the party of the second part (the plaintiff) performs his duties under this agreement, and shall have the right at any time to dismiss him for incapacity or breach of duty, in which event the party of the second part shall only be entitled to be paid his salary up to the time of such dismissal, and shall have no claim whatever against the party of the first part."

The defendant dismissed the plaintiff within three months of the date of the agreement for alleged disobedience and incapacity, without communicating to the plaintiff his reasons for so acting, or calling upon him for any explanations.

Held (HAGARTY, C.J.O., dissenting), that the plaintiff had certain rights of property under the agreement; that the parties to it therefore did not occupy merely the relation of master and servant, and that the tenth clause did not give the defendant a right arbitrarily to dismiss the plaintiff, but that he occupied a quasi-judicial position, and was bound to act in good faith, and to enquire into the circumstances upon which he based his determination to dismiss, this necessarily involving notice to the plaintiff and an opportunity of being heard.

Russell v. *Russell.* 14 Chy.D., 471, distinguished.

Judgment of the Queen's Bench Division, 16 O.R., 495, affirmed.

McCarthy, Q.C., and *J. J. Scott* for the appellant.

Moss, Q.C., and *Carscallen* for the respondent.

THORNLEY *v.* REILLY.

Liquor License Act—Sale of liquor after notice —Notice how given—R.S.O., c. 194, s. 125.

This was an appeal by the defendant from the judgment of the County Court of York, reported 26 C.L.J., 26, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 13th of February, 1890.

The plaintiff, a married woman, brought the action under R.S.O., c. 194, s. 125, to recover from the defendant, an hotel-keeper, damages because of the sale by him to her husband of intoxicating liquor after notice not to sell. The notice was signed by the plaintiff and served by her agent.

The action was tried before MACDOUGALL, Co.J., and a jury, and the damages were assessed at $100. The defendant contended that notice signed and served as aforesaid was not sufficient, and that notice by the Inspector was necessary. The learned judge decided against this contention, and judgment was entered for the plaintiff.

This Court was divided in opinion, and the appeal was dismissed with costs.

Per HAGARTY, C.J.O., and BURTON, J.A. The right of action for damages depends on the notice being given by the person filling the public position of Inspector, though the liability as far as the penalties are concerned will be incurred upon notice being given by the private individual. This is the reasonable construction of the words, "person requiring the notice to be given," in themselves, and would appear to be the intention of the Legislature, these narrower words having been substituted for the wider ones of the former section.

Per OSLER and MACLENNAN, JJ.A. The whole scope and effect of the section must be looked at, and liberal constructions given to it. The notice must in all cases be signed by the private individual, and whether served by the Inspector or not, the private individual gives the notice, and the words may fairly be construed to mean "person requiring to give the notice," and there is a right of action whether the notice is served in one way or the other.

Murdoch for the appellant.

Le Vesconte for the respondent.

TEMPERANCE COLONIZATION SOCIETY *v.* FAIRFIELD.

Contract—Fraud — Rescission — Repayment of consideration — Statute of Frauds — Uncertainty.

This was an appeal by the plaintiffs from the judgment of the Common Pleas Division,

reported 16 O.R., 544, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 13th and 14th of November, 1889.

The appeal was dismissed with costs.

Per HAGARTY, C.J.O. The agreement was void for uncertainty, the land in question not being in any way defined or ascertained or capable of being defined or ascertained, and at any rate misrepresentations justifying rescission were proved.

Per BURTON, OSLER, and MACLENNAN, JJ.A. The plaintiffs were unable to give to the defendant the right of selection they had agreed to give him, so that the action necessarily failed, and the defendant was entitled to judgment on his counter-claim, there being a failure of consideration.

Per BURTON, J.A., also. The agreement was in itself sufficiently certain, and was not void for misrepresentation.

Per MACLENNAN, J.A., also. No misrepresentations justifying a rescission of the contract were proved, but the agreement was void for vagueness and uncertainty.

McCarthy, Q.C., and *A. H. Marsh* for the appellant.

McLaren and *McClive* for the respondent.

Queen's Bench Division.

Div'l Ct.] [March 8.

COCKBURN *v.* BRITISH AMERICA ASSURANCE COMPANY.

Insurance—Fire—Interim receipt—Powers of local agent of insurance company—Approval by company—Indorsements of application—Non-repudiation of contract—Prior insurance—Eighth statutory condition—Assent of company—Election not to avoid—Extension of policy.

A local agent of the defendants effected an insurance against fire upon the plaintiff's steam power saw-mill and machinery, and issued to the plaintiff an interim receipt therefor, dated 4th July, 1888, purporting to be issued by the defendants. The plaintiff at the same time insured the property in other companies. The plaintiff had a prior insurance upon the same property effected by the defendants, and held a policy therefor, and had also a prior insurance in another company.

The local agent enclosed the application for the second insurance to the defendants in a letter dated 17th July, 1888, in which he stated that he sent the policy representing the prior insurance by concurrent book post, to be extended in a manner specified. The defendants received the policy and made the desired extension, and in an action upon the policy and the subsequent interim receipt the jury found that they had also received the letter enclosing the application. The defendants, however, acted throughout as if they had not received it, and on the 7th September, 1888, after they had been furnished with a copy of the application, they wrote to their agent requesting him to take up the interim receipt and return it to them, and informing him that as it had run one-half of the term they had debited him with one half of the premium as earned, and on the same day they re-insured half the risk in another company. The plaintiff was never informed that the defendants had refused the risk, and he was ignorant of it until after the fire, and the defendants never returned him any portion of the premium paid.

The application for the second risk correctly stated the amount of insurance on the property, but not the names of the companies insuring. In the copy of the application subsequently sent to the defendants it was not stated that the defendants had a prior insurance. Indorsed on the application was the following: "Special. To be submitted to the company for approval before receipt is issued;" and "Applications for insurance on property where steam is used for propelling machinery must be approved by the head office at Toronto before the company will be liable for any loss or damage." The plaintiff's attention was not called to these indorsements, and he was not aware that the agent had no authority to grant the interim receipt on this account. The agent swore that he had never received instructions not to grant an interim receipt under such circumstances.

Held, that the indorsements formed no part of the application signed by the plaintiff, and that the agent was acting in the apparent scope of his authority, and was to be deemed *prima facie* to be the agent of the company; and as the defendants never repudiated the contract, but merely determined to put an end to it, and

treated it as a subsisting contract, they were liable upon it.

Under the eighth statutory condition the defendants claimed that they were not liable upon the receipt, because there was prior insurance in another company, and their assent did not appear in and was not indorsed on the policy, or that they were not liable upon their earlier insurance because of the subsequent insurance in other companies without their assent.

Held, that the application and the interim receipt constituted the contract of insurance, and as in this contract the total amount of insurance was truly stated, and the contract continued to be binding until after the loss occurred, the defendants must be considered to have assented to such insurance, and they would be compellable to make their assent appear in, or to have it endorsed on, their policy, if such policy were issued.

Held, also, that the prior insurance was voidable, not void, and that the defendants, after the subsequent contract was entered into in which the total amount of insurance was stated, and after they knew that it was entered into, had elected not to avoid the prior insurance, but to treat it as still subsisting by extending it.

Semble, that the defendants, having assented to the insurance stated in the contract of insurance, could not assert that the effecting such insurance had the result of avoiding the prior insurance effected by their policy.

W. Nesbitt for plaintiffs.

Laidlaw, Q.C., for defendants.

STREET, J.] [March 21.

MARTIN *v.* MCMULLEN.

Bankruptcy and insolvency — Assignment for benefit of creditors—R.S.O., c. 124— Valuing security—Guaranty, construction of.

A deceased person, of whom the plaintiff was executor, gave the defendants a guaranty in respect of goods sold and to be sold to another, in the following terms: "I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called in any event to pay a greater sum than $2,500."

The principal debtor, being indebted to the defendants in $5,500, made an assignment under R.S.O., c. 124, and the defendants filed a claim with the assignee, but did not, in the affidavit proving the claim, state whether they held any security or not. At a later date the plaintiff paid the defendants the $2,500, and filed a claim with the assignee.

Held, that the guaranty was not a security which the defendants were required to value under the Act, and that the omission from their claim of a piece of information which could not affect it did not render it invalid.

Held, also, that this was a guaranty, not of part, but of the whole of the debt, limited in amount to $2,500, that is, a guaranty of the ultimate balance after all other sources were exhausted; and the plaintiff was not entitled to rank upon the estate in respect of the $2,500, nor to recover any part of any dividend which the defendants had received.

Hobson v. *Bass*, L.R., 6 Chy., 792, distinguished; and *Ellis* v. *Emmanuel*, 1 Ex.D., 157, followed.

S. G. McKay for plaintiff.

G. C. Gibbins for defendants.

MACMAHON, J.] [April 9.

ABRAHAM *v.* ABRAHAM.

Alimony—Registration of judgment for—Assignment by defendant for general benefit of creditors—Priorities—R.S.O., c. 44, s. 30—R.S.O., c. 124, s. 9.

The precedence given to an assignment for the general benefit of creditors by R.S.O., c. 124, s. 9, over "all judgments and all executions not completely executed by payment," does not extend to a judgment for alimony registered against the lands of the defendant prior to the registration of the assignment; for by R.S.O., c. 44, s. 30, the registration of such a judgment is to have the same effect as the registration of a charge by the defendant of a life annuity on his lands; and the defendant could not convey the lands unless subject to the charge so created; and therefore a general assignment for the benefit of creditors by the defendant in an alimony action, which was not executed until after judgment against him and not registered until after the registration of the judgment, did not take precedence of the judgment, and the plaintiff was not obliged to rank with the other creditors of the defendant.

Idington, Q.C., for the defendant, Hossie.

Osler, Q.C., and *W. M. Douglas*, for the plaintiff.

Common Pleas Division.

MACMAHON, J.] [Dec. 10, 1889.

SCOTTISH AMERICAN INVESTMENT CO. *v.* TENNANT.

Mortgage—Right to consolidate.

The plaintiffs, who were the mortgagees under three mortgages from the same mortgagors on different lands, were held entitled only to consolidate in respect of the mortgages in default when action brought to enforce them, and as the amount due on the mortgages had been paid, and there was then no default, the right to consolidate was refused.

Lockhart Gordon for the plaintiffs.

Urquhart for the defendant.

MACMAHON, J.] [Dec. 10, 1889.

STACK *v.* SHAND.

Dower—Payment of yearly sum by report of commissioners—Payable only from filing of report—Dower Procedure Act—O. J. Act.

After action commenced and judgment obtained under the O. J. Act for the recovery of dower in certain lands, proceedings were taken under the Dower Procedure Act for the assignment of dower, but the commissioners appointed under the Act, in lieu of assigning dower, reported in favor of a yearly sum being paid. The report was filed in the office of the local registrar of the court, and in the local registry office, on the 22nd February, 1889.

Held, that there could only be a recovery of the sums assessed since such last named date.

Held, also, that had proceedings been continued under the O. J. Act, instead of substituting those under the Dower Procedure Act, the plaintiff's remedy would have been very different.

Washington for the plaintiff.

Hoyles, Q.C., for the defendant.

Div'l Ct.] [March 7.

BADGEROW *v.* GRAND TRUNK RAILWAY CO.

Railways—Accident—Negligence—Evidence of—Defective brake—Latent defect.

Action by the plaintiff to recover damages for the death of her husband, by reason of, as was alleged, a defective brake on a car on defendants' railway, on which deceased was employed as a brakeman.

Held, there could be no recovery, for the evidence failed to show how the accident happened, the contention that it was the defective brake being mere conjecture; and even if it were the cause of the accident, it would be no ground of liability, for, under the defendants' rules, it was the deceased's duty to examine and see that the brakes were in proper working order, and report any defect to the conductor, and if he made the examination he apparently discovered no defect, as he made no report, a latent defect being no evidence of negligence, and if he omitted to make such examination, etc., then the accident would be attributable to his own negligence.

McCullough for the plaintiff.

Nesbitt for the defendants.

Div'l Ct.] [March 7.

REGINA *v.* CANTILLON.

Liquor License Act—Adjudication—Conviction—Imprisonment without prior distress—Cost of conveying to jail.

The adjudication on a second offence under the Liquor Act, without providing for distress, directed immediate imprisonment on default of the payment of the fine and costs, and the conviction drawn up under it was in similar terms. After the issue of a writ of *certiorari*, but before its return, an amended conviction was returned providing for distress being first made.

Held, that the adjudication and conviction made under it were bad for not providing for distress, and that the amended conviction could not be supported, because it did not follow the adjudication.

Semble, that had the amended conviction been in other respects good, it would not have been bad under the Liquor License Act for including the costs of conveying to jail.

DuVernet for the defendant.

Langton for the Crown.

Div'l C't.] [March 7.

REGINA *v.* ROWLIN.

Conviction—Imposition of costs of commitment and conveying to jail—Offence against Public Health Act R.SO., c. 205.

A conviction for carrying on a noxious and offensive trade contrary to R.S.O., c. 205, the Public Health Act, imposed in default of suffi-

cient distress to satisfy the fine and costs, imprisonment in the common jail for fourteen days, unless the fine and costs, including the costs of commitment and conveying to jail, were sooner paid.

Held, following *Regina* v. *Wright*, 14 O.R., 668, that the imposition of the costs of commitment and conveying to jail were unauthorized, and that s. 1 of R.S.O., c. 74, not referred to in that case, did not affect the question.

Bicknell for the applicant.

Aylesworth, Q.C., and *Waddel* contra.

Div'l Ct. [Feb. 23.

GARDNER *v.* BROWN.

Dower—Equity of Redemption.

There can be no dower in land of which the husband merely acquired the Equity of Redemption, and which he had parted with.

Re Croskery, 16 O.R., 207, followed.

Arnoldi for the applicant.

R. M. Macdonald contra.

Div'l Ct.] [March 7.

HUFFMAN *v.* WATERHOUSE.

Innkeeper—Sale of stallion under R.S.O., c. 154, for keep, &c—Lien—Revival of—Tavern license—Owner of.

An innkeeper, claiming to act under R.S.O., c. 154, sold by public auction a stallion belonging to the plaintiff, a boarder at his inn, to enforce his lien thereon for the keep and accommodation thereof.

Held, that the sale was authorized after the lien accrued; the plaintiff removed the stallion and subsequently brought it back to the inn.

Held, that the lien revived after the return of the stallion.

Under s. 12 of R.S.O., c. 194, the person receiving a tavern license is assumed to have satisfied the license commissioners that he is the true owner, but, notwithstanding, it can be shewn that the licensee was merely the agent of another, who was the real owner of the business.

D. O. Cameron and *Blain* for the plaintiff.

McFadden for the defendant Waterhouse.

Graham for the defendant Broddy.

Chancery Division.

Div'l Ct.] [March 8.

CAMERON *v.* WALKER.

Limitation of actions—Wife's property—Removal of disability of coverture—When time commences to run as against mortgagee or those claiming under the mortgage—Title by possession.

A. and B., husband and wife, were married in 1841. B. acquired certain land in 1865. Defendant was put in possession of the land (three lots) in 1869, and received a deed of one of the lots in 1870. Defendant remained in possession until 1888.

A. and B. made a mortgage of the other two lots in 1881, and a deed in 1884. Plaintiff purchased these two lots from an assignee of the mortgagee under the power of sale in the mortgage, and put up a fence around them, dividing them from the lot conveyed to defendant, and defendant pulled it down. Plaintiff then brought an action of trespass.

Held (affirming ROSE, J.), that B.'s disability of coverture having been removed in 1876 by 38 Vict., c. 16, s. 5 (O.), the Statute of Limitations ran against her from that time, and that defendant had acquired a good title by possession under 38 Vict., c. 16, s. 1 (O.) But,

Held, also, that as the plaintiff was a person claiming under the mortgage, the statute did not commence to run against him until (as the earliest possible period) the date of the mortgage, less than ten years before action, the plaintiff must succeed, and the judgment in the court below must be reversed.

G. M. Macdonell, Q.C., for plaintiff.

J. McIntyre, Q.C., for defendant.

BOYD, C.] [March 13.

KENNEDY *et al v.* HADDOW *et al.*

Mechanics' lien—Prior mortgage—Subsequent lien—Increase of selling value of the land—Priority.

Before a mortgagee having priority upon the mortgaged premises for payment of his security is postponed to the claim of one who subsequently does work upon the premises, it mus be clearly proved that the selling value of he land has been increased by the work done.

The mortgage should retain its priority to the

extent of the value of the security before the work is begun in respect of which the lien attaches, and the lien should have priority only to the extent of the additional value given by the subsequent improvements. The Court has always been solicitous to protect mortgagors from being improved out of their property, and under the Mechanics' Lien Law the Court must be equally solicitous to protect mortgagees from being improved out of their security.

C. J. Holman for the mortgagee.

Hoyles, Q.C., for the lien holders.

BOYD, C.] [April 2.

RE MCLEAN AND WALKER.

Sale of land—Agreement—When payment to be made—Title—Prior mortgage—Time to take possession—Interest.

In an agreement for the sale of land it was provided that the cash payment should be made and the mortgage for the balance given "so soon as the solicitors for the purchaser shall be satisfied with the title."

Held, that the meaning of the contract was, that payment was not to be required until such title was shown as would justify the purchaser in taking possession; and, following *Wills* v. *Maxwell*, 32 Beav., 552, that no satisfaction being given as to a prior mortgage affecting the land until two years after the agreement, the purchaser could not prudently take possession until then, and interest on the purchase money should only be allowed from that time.

H. Cassels for the vendor.

Moss, Q.C., for the purchaser.

BOYD, C.] [April 3.

Re GOODFELLOW, TRADERS BANK *v.* GOODFELLOW.

Banks and banking — Warehouse receipt—Wheat, conversion into flour — Following moneys representing such flour—R.S.C., c. 120, s. 56.

The Traders Bank took a warehouse receipt from one G., a miller, on 2,800 bushels of wheat in his mill on August 12th, 1888. G. died June 19th, 1889. Shortly before his death the Bank became aware that there was a shortage of wheat in the mill and took possession of what was then there, viz., some 700 bushels. It was proved that as a matter of fact there had been a shortage ever since August 27th, amounting to never less than 638 bushels. Subsequently to August 27th some wheat had been manufactured into flour, and sold out of the mill by G., and some $105 had come into the hands of the administrator of his estate from this source, which sum was a great deal less than the value of 638 bushels of wheat. There was no attempt to prove that this flour was made from the identical 2,800 bushels of wheat in the mill when the receipt was given.

Held, on appeal from the report of the Master at St. Thomas, that the Bank was entitled to follow this sum of $105 in the hands of the administrator, and to claim the same under their warehouse receipt.

A. H. F. Lefroy for the appeal.

Malone, contra.

Practice.

MACLENNAN, J.A.] [April 14.

MULOCK *v.* CAWTHRA.

Money in court—Payment out to next of kin of deceased party — Personal representative — Revivor.

Money in court will not be paid out to the next of kin of deceased parties without a personal representative having been appointed and made a party by revivor, except in simple cases, where the sum in court is small and the circumstances are such that the court can see that it is safe to dispense with administration or revivor or both, in order to save costs.

R. M. Macdonald for the applicants.

MACLENNAN, J.A.] [April 14.

MCCONNELL *v.* WAKEFORD.

Security for costs—Residence of one of two plaintiffs out of Ontario—Rule 1242—Indorsement on writ of summons—Order for security—Irregularity—Nullity—Waiver by compliance.

The writ of summons was indorsed with a statement that the plaintiffs resided at the township of Brant, in the County of Bruce, and in the State of Wisconsin, in the United States of America. Upon this an order was issued upon

præcipe, under Rule 1242, by an officer of the Court, requiring one of the plaintiffs to give security for costs and staying proceedings until security should be given. The plaintiffs, desiring to arrest the defendant, were refused an order because of the stay of proceedings, and then applied for and obtained an order allowing them to deposit $400 with an officer of the Court instead of giving a bond for security of costs, and also declaring it to be without prejudice to the right of the plaintiffs to set aside the order staying proceedings, and they paid the $400 to the officer accordingly.

Held, that it appeared from the endorsement on the writ that the plaintiffs resided out of Ontario, and that the issue of an order for security under Rule 1242 was thereby warranted; but that the order issued, being against one plaintiff only, was irregular and might have been set aside; it was not void, however, and was good until set aside; and having been complied with, as it was by the deposit of the money with the officer, the compliance made it good, and it could not afterwards be set aside, notwithstanding the reservation in the order.

Semble, that if it had appeared by the indorsement, as it afterwards did by affidavit, that one of the plaintiffs in fact resided in Ontario, the order for security would have been void, and would have been set aside notwithstanding the compliance with it.

W. H. Blake for plaintiff.

W. M. Douglas for defendant.

BOYD, C.] [April 15.

STEPHENSON *v.* DALLAS.

Judgment under Rule 739—When granted—Leave to defend—Terms—Evidence on motion—Ex parte examination of witness.

When the facts are not clear and free from doubt, leave to sign judgment under Rule 739 should not be granted.

Bank of Minnesota v. *Page*, 14 A.R., 351, followed.

But where a distinct defence is not made out terms should be imposed upon the defendant upon his being allowed to defend, as a pledge of his *bona fides;* and in this case the defendant was required to pay into Court or secure one-half of the amount claimed.

The examination of a witness conducted by one party without notice to his opponent, is irregular and inadmissible as evidence upon a motion.

H. C. Fowler for the plaintiff.

Walter Macdonald for the defendant.

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(COMPILED FOR THE CANADA LAW JOURNAL.)

Latest additions:

American and English Railroad Cases, Digest to vols. 1-35, by W. M. McKinney, Northport, 1889.

Anderson on Execution, London, 1889.

Beach's Railway Digest for 1889, Jersey City, 1890.

Bigelow on Estoppel, 5th ed., Boston, 1890.

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Browne on Divorce, Philadelphia, 1890.

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Chitty on Contract, 12th ed., London, 1890.

Daly's Law of Clubs, 2nd ed., London, 1889.

Foster's Federal Practice, Boston, 1890.

Gray's Cases on Property, vols. 3 and 4, Cambridge, 1889.

Harris on Subrogation, Albany, 1889.

High on Injunctions, 3rd ed., 2 vols., Chicago, 1890.

Hurd's Revised Statutes of Illinois, Chicago, 1889.

Jones on Corporate Bonds, Boston, 1890.

Keener's Cases on Quasi Contracts, 2 vols., Cambridge, 1888-9.

Law List (The), London, 1890.

—Reports (Ireland), Digest of Cases, 1878-88, vols. 1-20, Dublin, 1890 (2 copies).

Murray's New English Dictionary, vol. 1, A and B, Oxford, 1888.

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Official Law List, by H. R. Hardy, Toronto, 1890.

Remsen on Intestate Succession, 2nd ed., New York, 1890.

Renton's Dictionary of English Law, London, 1889.

Rogers: Law and Medical Men, Toronto, 1884.

Schouler on Executors, 2nd ed., Boston, 1889.

Simpson on Infants, 2nd ed., London, 1890.

Smith's Mercantile Law, 10th ed., 2 vols., London, 1890.

Stearn's Germs and Developments of the Laws of England, New York, 1889.
Stringer on Oaths and Affirmations, London, 1890.
Taylor's Origin and Growth of the English Constitution, London, 1889.
Thomson's N.Y. Statutes at large, vol. 2., 1881-88, Albany, 1890.
Thomson on Highways, 4th ed., Albany, 1890.
Throop's Code Civil Procedure, Albany, 1889.
United States General Digest, Rochester, 1889.
Virginia Reports, vol. 14 (Grattan) to vol. 84, 1857-88.
Warvelle on Vendors, 2 vols., Chicago, 1890.
Wernse's American Law Digest and Legal Directory, New York, 1890.
Wertheimer on Clubs, 2nd ed., London, 1889.
Wheeler on Carriers, New York, 1890.

Law Society of Upper Canada.

LAW SCHOOL—HILARY TERM, 1890.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

CURRICULUM OF THE LAW SCHOOL.

Principal, W. A. REEVE, Q.C.
Lecturers, E. D. ARMOUR. A. H. MARSH, LL.B.
Examiners, R. E. KINGSFORD, LL.B. P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto, are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to

ject in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1890, fourteen Scholarships in all will be offered for competition, seven for those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students.

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School :

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other ora methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Pmith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

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THE Examinations before Easter Term of the Law Society and Law School are now in progress, and judging from the number of candidates, the length of the papers given, and the energy displayed by the students, the examiners will be immersed in examination papers for several weeks to come. About 200 candidates presented themselves for examination, of whom 53 have taken the first-year examination in the Law School, and 58 the examination for the second year, 53 of whom wrote for honours. In the Law Society Examinations under the old curriculum, there were 28 candidates for the First Intermediate, 31 for the Second Intermediate, 26 for Solicitor, and 29 for Bar. The papers set for the students in the Law School contain twelve questions each, instead of the seven set to candidates under the old curriculum. The increase in the number of questions, and the care required in making the papers a fair test of the knowledge of the student and the work of the Law School, the double set of examination papers to be prepared, and the large number of new works placed on the list for examinations, have added greatly to the labour and responsibility of the examiners. They complain very justly of the inadequate remuneration granted them for their work, and we think they are fairly entitled to a substantial addition to the sum at present allowed them.

THE Court of Appeal has lately delivered judgment in the cases argued before it at the preceding sittings. Among the more important decisions are: *Regina* v. *Wellington*, where a tax sale and conveyances thereunder were set aside as void against the claim of the Crown as mortgagee of the lands; *Heward* v. *O'Donohoe*, in which the question of what is possession of lands sufficient to acquire title under the Statute of Limitations is discussed; *Herr Piano Company* v. *Central Bank*, where it was held that the bank could not follow as trust moneys into the hands of the company the amount of overdrafts in the private account of certain persons who were directors of the plaintiff company and of the bank; *Brady* v. *Sadler*, which involves the construction of a Crown patent; and *Cumberland* v. *Kearns*. In the latter case the court, sustaining the judgment of the Chancery Divisional Court, were unanimously of opinion that a local improvement rate charged upon the lands in question to defray the expenses of a scheme of improvements undertaken by the Municipal Corporation, on the petition of the defendant and others, was an incumbrance for which the plaintiffs were entitled

under the covenants in the conveyance against incumbrances and for quiet enjoyment, to recover from the defendant as damages a sum sufficient to remove the charge. A vendor of lands, upon which a local improvement rate is imposed, should, therefore, provide in the agreement of sale that the purchaser shall take the lands subject to the rate. Otherwise the purchaser may, before conveyance (and after conveyance, if the vendor has petitioned the corporation for the improvements, or has been in any way instrumental in creating the charge), compel him to commute the rate and remove it as an incumbrance upon the lands, or deduct a sum out of the purchase money sufficient to answer the charge. For the present sittings of the court, commencing on the 13th, there are thirty cases set down on the list, among which is the celebrated case of *Commee* v. *C. P. Railway*. Three cases have been postponed for the convenience of counsel and until the services of an *ad hoc* judge can be procured. There have been no arrears in the court for some time past, and the judges, we believe, complain that the business of the court is delayed on account of counsel not being ready to proceed with their cases when called. We do not see why any different rule should prevail in the Court of Appeal than at the Assizes, and if counsel are not ready to proceed, or where no adequate grounds are stated for postponement, the cases should be struck off the list or dismissed, and no subsequent application for reinstatement of the cases be considered. If this rule were rigidly adhered to, junior counsel might have an opportunity for counsel work which is at present monopolized by leading counsel.

FUNDS IN COURT.

It is not our purpose to trace out the history of events which have resulted in the present practice of payment into court, or the relations of the court to the funds paid in, but rather to point out how the matter stands at the present time in regard to funds standing in court. The history of the Court of Chancery in Ontario, whose jurisdiction in regard to money paid in, including that of the former Courts of Queen's Bench and Common Pleas, is now vested in the High Court of Justice, shows that from very small beginnings the general balance in court has risen to a very large sum indeed. So far as the information at our command enables us to speak, this balance now amounts to upwards of $2,100,000. This sum consists of moneys resting in court for an infinite variety of reasons, some of which are that the persons entitled are minors, or of unsound mind; that the moneys are subject to a trust for unascertained persons, and subject or not to life-tenancies of some known individuals; or sometimes the funds are waiting for the happening of some event entitling some one to apply for the moneys; or, as is too often the case, the moneys are in court by reason of the default of trustees, or simply because there is no trustee.

The care of a fund consisting of so many different items, and with so many different interests to be conserved, would be in itself a very grave charge for a corporation specially organized for the purpose; yet up to the present time the

judges, with the staff of the accountant's office, have accomplished the task. So far as we know, there has never been a loss to a suitor in respect of a fund in court. This forms no insignificant factor in the aggregate of responsibility and labour cast upon our judges for which they are practically unremunerated, and might have been properly commented on in the article in our April number (*ante* p. 162) upon the subject of Judicial Salaries.

The court has always been anxious to have the funds in court made as productive as possible for the benefit of those interested therein. Until 1882 persons interested in funds in court might apply to have the same lent out upon mortgage with the approval of the court. Such applications were then very common, and large amounts were thus from time to time invested. The bank with whom the court did business also paid interest upon the general balance at an agreed rate, so that the result was that suitors were always able to obtain interest at a minimum rate of four per cent. Since 1882, however, a change has obtained in the whole system, and only in exceptional cases may suitors procure their money to be invested upon their own application.

In March, 1882, the former Consolidated Rule of Court, No. 521, was passed, which is in the following form :

"Whereas, by the Act, 35 Victoriæ, chapter 83 (Ontario), the Toronto General Trusts Company was incorporated, and thereby empowered to act as agents for the transaction of business as therein mentioned ; And whereas, by the Act of 45 Victoriæ, chapter 17, the said Company may be accepted by the High Court of Justice as a Trust Company for the purposes of the said court, in case the Lieutenant-Governor-in-Council shall approve thereof as therein set forth ; And whereas the said company has been so approved of by the Lieutenant-Governor-in-Council, by order dated the 10th day of March, 1882 ; And whereas the expenses of the accountant's office have been, by the Ontario Judicature Act of 1881, declared to be a first charge upon the income arising from the funds in court, and it is not desirable to reduce the interest payable to suitors to a less rate than four per cent., and it is necessary to procure the investment of moneys in court in order to raise a sufficient income to keep up this rate and provide for the expenses of the accountant's office: Therefore it is ordered that the Judges of the Chancery Division may arrange with the said Company to make investments, and to take the securities in the name of the Accountant of the Supreme Court of Judicature, of moneys in court upon first mortgages of lands, and may direct the issue of cheques therefor upon condition that the said company do, by proper instrument, guarantee the sufficiency of such securities, and the due payment of interest at the rate of 4½ per cent. per annum half-yearly on the moneys so invested from the date of the receipt by the company of the money for each investment, and also the due repayment of the principal moneys so invested ; and upon further condition that in case the said company makes an investment as aforesaid at a higher rate than six per cent. ; and upon further condition that the said company is to satisfy the official guardian of the said High Court of the sufficiency of the security as to value, and who is to certify the same to the court before the cheque issues for each investment."

This rule is now represented by the present Consolidated Rule 191, which is as follows:—

"The judges may arrange with the Toronto General Trusts Company to make investments, and to take the securities in the name of the Accountant of the Supreme Court of Judicature, of moneys in court, upon first mortgages of lands, and may direct the issue of cheques therefor upon condition that the said company do, by proper instrument, guarantee the sufficiency of such securities, and the due payment of interest at the rate of 4½ per cent. per annum, half-yearly, on the moneys so invested from the date of the receipt by the company of the money for each investment, and also the due repayment of the principal moneys so invested; and upon further condition that in case the said company makes an investment as aforesaid at a higher rate than 6 per cent., then the said company is to pay interest thereon to the court at the rate of 4¾ per cent.; and upon further condition that the said company is to satisfy the official guardian of the said High Court of the sufficiency of the security as to value, and he is to certify the same to the court before the cheque issues for each investment."

The Toronto General Trusts Company has up to the present time invested the general balance of the funds in court, less that retained by the bank, on the terms of the general order. The total sum invested by that company under this arrangement up to 31st March, 1889, is stated at $2,454,000, making an average of upwards of $350,000 per annum for the seven years. The company, with this business to do and the large opening for a general trust business which has undoubtedly existed for some time, has naturally become a very prosperous concern.

It must be borne in mind that, besides the general investing company, the court has a general banker—the Canadian Bank of Commerce, who pay the court a given rate of interest in consideration of having a large balance in return, $500,000, constantly at the credit of the court in their hands.

We cannot, without more data before us, state the cause, but the fact is, that lately the court has found itself compelled to reduce the rate of interest paid to suitors on funds lying in court from 4 to 3½ per cent. per annum.

Many persons are largely dependent upon the income from funds in court, and this change is productive of much discontent. Efforts have been made in different ways to procure the payment out of moneys for investment by trustees who could invest at market rates, and net more to their *cestui que trustent* than the court pays. Such applications have, however, been uniformly denied. The last case of this kind reported is *Re J. T. Smith's Trusts* (2), 18 Ont. Rule, 327, where a petition was presented to the court by the Trusts Corporation of Ontario and a party who was entitled for life to the income of a fund in court, the proceeds of the sale of certain settled estates, for the payment out of the fund for the purpose of investment by the company as trustees (they having been appointed as substituted trustees under the will which devised the settled estates), and the application was opposed by the official guardian on behalf of the remainderman. The Chancellor held that the practice and current of authority were against payment out of court of the moneys as asked by the petitioners, and that they were not entitled to it as a matter of right, and dismissed the application.

It seems to us that the court might very well relax its rule in favour of trustees in the shape of such Trusts Companies, as present security for their duties sufficient to receive the approval of the Lieutenant-Governor-in-Council under R.S.O., cap. 157, sec. 74, which provides that on obtaining such approval the court may appoint such a company trustee, executor, etc., without requiring the usual or any security. This form of company is of course new here.

Is the chartering of a company and the approval of the Lieutenant-Governor under the Act for the purpose (in the language of the Act and order) "of being accepted by the High Court of Justice for Ontario as a Trusts Company for the purposes of such court," a legislative sanction which the court should recognize? So far as suitors are concerned, to leave them without the benefit of competition is certainly a hardship. Until the year 1889 the Toronto General Trusts Company was the only Trusts Company organized which had received the approval of the Lieutenant-Governor-in-Council above referred to, which may account for the exclusive language of the former rule 521 and the present rule 191. In 1889, however, the Trusts Corporation of Ontario came into existence, and duly received the approval of the Lieutenant-Governor-in-Council before mentioned. The new company—The Trusts Corporation of Ontario — has applied to the Judges of the High Court of Justice to have the general order amended by making it wide enough to include them in the arrangement for investing court moneys, and to allow them to make an offer more advantageous to the suitors than the existing arrangement, or to throw the business open to competition. This application is now pending, and we therefore forbear comment upon it for the present. Suffice it to say just now, that the Trusts Corporation sets up that the existing arrangement was made at a time when the Toronto General Trusts Company was the only company in existence with whom the court could deal, and that that company obtained the business without competition, and practically on their own terms. This the Toronto General Trusts Company refuse to admit, and set up that having undertaken the business when the court required them, and having done their duty faithfully, they should not be disturbed by allowing competition or a rival company to interfere in the business, as that interference would injure them. The Trusts Corporation reply that the interests of the Toronto General Trusts Company are irrelevant to the question, and that the only interests which the court have to deal with are those of the persons interested in the funds in Court, and that it is the duty of the court to take the best means of procuring for them the largest return for their money consistent with absolute safety in the investment of it, and that the Trusts Corporation claims to be desirous of making an offer to compete for the purpose of assisting the court.

We shall watch with interest the result of the application. Obviously some effort must be made to prevent the rate of interest payable by the court upon funds in court being permanently reduced below four per cent. per annum. The public naturally look to the judges for protection. It is a question whether the use by the court of any Trusts Company, in the way the Toronto General Trusts Company in now used,, is really as beneficial to the persons inter-

ested in the fund, at least for the purpose of producing the best result in the way of income, consistent with safety, as the careful investigation by the judges, or by an officer of the court, of investments presented by suitors or beneficiaries, or by recognizing the approved companies when appointed trustees as entitled to have paid out to them the funds of the trust as contended for in the case above cited. If the contention be correct that the interests of the persons entitled to the funds are paramount, then the whole question should be faced. If on the whole it be thought that Trust Companies should be used as general investing agencies, then the court must consider whether the competition of a second, or third, or fourth Trust Company should not be invoked to produce the best result to those persons for whose interests the judges are responsible.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We continue the Law Reports for April.

LONDON AGENT OF COUNTRY SOLICITOR—INTEREST ON COSTS.

The question in *Ward* v. *Lawson*, 43 Chy.D., 353, was simply this, viz., whether, where a country principal recovers from his client interest on his costs, his London agent is entitled also to interest on his agency fees included in such costs. The Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) decided that in the absence of any special agreement for interest, the agent was not entitled, and the decision of Chitty, J., to the contrary was therefore reversed.

JUDICIAL INQUIRY—DOMESTIC FORUM—PERSONAL INTEREST OF MEMBER OF TRIBUNAL.

An important question is discussed in *Leeson* v. *General Council of Medical Education*, 43 Chy.D., 366. The plaintiff, a medical practitioner, was charged by the managing body of an association of medical men, called "The Medical Defence Union," with infamous conduct, and an inquiry ordered by "The General Council of Medical Education" into the alleged charge, on which inquiry the plaintiff was found guilty, and his name ordered to be removed from the register. Two out of the twenty-nine persons who held the inquiry were also members of the Medical Defence Union, but were not members of the managing body of the Union, and had taken no part in promoting the inquiry. The plaintiff in the present action sought to restrain the General Medical Council from removing his name from the register, and from publishing the resolutions which they had passed with respect to his conduct, on the ground that the two persons in question were disqualified from taking part in the inquiry, which was therefore invalid. But the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.), though divided in opinion, affirmed the decision of North, J., that the two members of the Medical Defence Union were not disqualified from taking part in the inquiry. Fry, L.J., who dissented, considered the principle laid down in *Regina* v. *Allen*, 4 B. & S., 915, was wide enough to preclude them from acting and to invalidate the proceedings; and it may be remarked that the judg-

ment of Bowen, L.J., is very like the famous verdict, "we find the prisoner not guilty of the crime charged, but strongly recommend him not to do it again." The case is an instructive one as to the extent to which the proceedings of domestic forums are examinable by a court of law.

WILL—CONSTRUCTION—REMOTENESS.

In re Hargreaves, Midgley v. *Tatley*, 43 Chy.D., 401, the Court of Appeal, in addition to disposing of a question of practice as to the jurisdiction of a judge in an originating summons, determined the construction of a will whereby a testatrix, who died in 1838, devised real estate to trustees in fee upon trust for her sister Mary, for her life, then for Mary's children successively for their lives; and after the death of Mary and her children, for her sister Elizabeth, and then to Elizabeth's children successively for their lives; and after the deaths of Mary and Elizabeth and their children, upon such trusts as the longest liver of Mary, Elizabeth, and their children should appoint, and in default of appointment, for the heir of the testatrix. The Court of Appeal held that the power of appointment was void, because the person to exercise it was not necessarily ascertainable within a life or lives in being and twenty-one years afterwards; because the children might not all be in being at the death of the testatrix. The case of *Brown* v. *Lloyd*, 5 Eq., 383, was overruled, and it was held that the heir at law of the testatrix took, not under the limitation is default of appointment, but under a partial intestacy.

BUILDING SOCIETY — BORROWING AND INVESTING MEMBERS—LIABILITY FOR LOSSES—EFFECT OF RULES.

In re West Riding of Yorkshire Building Society, 43 Chy.D., 407, Chitty, J., had to construe the rules of a building society in process of being wound up. These rules provided (1) that borrowing members could redeem their securities on payment of the amount fixed by the tables of the society, together with the full amount which should then be due "for subscriptions, fines, and other payments"; (2) that surplus profits, "after providing for all liabilities," should be appropriated equitably and equally between the investing and borrowing members, and (3) that "in the event of the directors determining," at a special meeting to be held every three years, that there was "a deficiency of income, by which the society might be prevented from meeting its anticipated expenditures and liabilities," the amount of such deficiency should be "apportioned by the directors" between the investing and borrowing members. The assets were insufficient to pay investing members the full value of their shares, and this was an application by the liquidator to place borrowing members on the list of contributories, no apportionment of losses having been made by the directors. Chitty, J., was of opinion that the "liabilities" to be provided for by rule 2 included sums payable to investing members; and that the word "income" in rule 3 was not used in contra-distinction to "capital," but meant what was coming in from all sources; and that "liabilities" in the same rule also included sums payable to investing members; and that under the rules borrowing mem-

bers were liable to contribute to any losses together with investing members, and that any borrowing member asking to redeem could only do so on paying what was due from him, including this liability; and he moreover held that the fact that the directors had not "determined" and apportioned the loss made no difference now that the society was being wound up by the Court. But for rule 3, which he held constituted a contract by the borrowing members to share all losses, he was of opinion that under *Toole* v. *North British Building Society*, 11 App.Cas., 489, losses other than to outside creditors would fall on the investing members alone.

TRUSTEE—POWER OF INVESTMENT—CORPORATION HOLDING FUNDS IN TRUST—TRUST INVESTMENT ACT, 1889 (52 & 53 VICT., C. 32) SS. 3, 5, 6, 7, 9—(R.S.O., C. 110, SS. 29, 30.)

In re Manchester Royal Infirmary: Manchester Royal Infirmary v. *Attorney-General*, 43 Chy.D.,42, certain funds were held by a corporation for a charitable trust, and an application was made by the corporation to North, J., to determine whether the corporation could properly invest the funds in the securities mentioned in the Trust Investment Act, 1889 (see R.S.O., c. 110, ss. 29, 30). He was of opinion that the corporation might so invest the fund, but that if the instrument creating the trust contained no power to vary the securities, it was not competent for them to sell existing investments for the purpose of investing the proceeds in securities mentioned in the Act. It may be noticed, however, that in R.S.O., c. 110, s. 29, there is an express provision enabling trustees to call in trust funds invested in any other securities than those mentioned in that section of the Act and invest the same in the securities mentioned in that section. But as regards the securities mentioned in R.S.O., c. 110, s. 30, there is no such express power to vary existing investments, and this case would therefore be an authority as to the construction of that section.

In the following case of *In re National Permanent Building Society*, 43 Chy.D., 431, North, J., also held that the funds of a benefit building society invested in the names of trustees for the society under the direction of the board, are not trust funds subject to the powers conferred by the Trust Investment Act, 1889. The trustees, in his view, had no power of reinvestment, but were merely agents of the society to whom the funds belonged, not as trust funds, but as their own property, and the Act contemplated that the trustees to whom it applied should have a discretion as to investment independently of the Act.

None of the other cases in this number seem to call for notice here.

Correspondence.

THE POWER OF COMMISSIONERS TO TAKE STATUTORY DECLARATIONS.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—A great deal of inconvenience has been caused the profession by a decision of Mr. Justice Patterson in *Regina* v. *Monk* at Whitby Assizes in 1876, which has been followed in a number of unreported cases, to the effect that Commissioners are not authorized to take Statutory Declarations under R.S.C., Cap. 141, "An Act respecting extra-judicial oaths." Although it is difficult to understand why a Commissioner is not included in the list of those authorized by the third section of that Act to take declarations, the wording of which is "any Judge, Justice of the Peace, Public Notary, *or other functionary authorized by law to administer an oath*," yet solicitors have been compelled to take the law as interpreted. The Legislature of Ontario, in order, it has been thought by some, to remove this inconvenience, has this Session passed an Act, providing that "Commissioners shall be deemed to have power to take Statutory Declarations in all cases in which Statutory Declarations may be taken, or may be required under the Devolution of Estates Act, or under any other Act from time to time in force in this Province." Now did not the Ontario Legislature exceed its power in passing what, in this view of the matter, is practically an amendment of a Dominion Act? For where the Dominion Act, according to the interpretation placed upon it in *Regina* v. *Monk*, says Commissioners shall not take Statutory Declarations, the Ontario Act says they may. And, moreover, as it is not within the powers of the Ontario Legislature to deal with criminal matters, even if they should give Commissioners power to take Statutory Declarations, they are unable to constitute it a misdemeanor to make a false declaration before a Commissioner. And so from this view of the case, it would seem that declarations taken before Commissioners are of the same value as before the passing of the Ontario Act.

But it must be borne in mind that there are many other statutory declarations besides those taken under the Extra-Judicial Oaths Act. The Ontario Act must surely be taken to affect only such declarations as are authorized by Ontario Acts, *e.g.*, the Election Act, Manhood Suffrage Act, the Public Service Act, the Legislative Assembly Act, Protection of Game Act, Assessment Act, Municipal Act, etc., for these Acts the Ontario Legislature may naturally and properly amend.

And may it not be that the general words used refer only to declarations that are *ejusdem generis* as those particularly described, viz., those made under the Devolution of Estates Act, *i.e.*, to those authorized by Ontario Acts? And thus far the new Act is effective. But in regard to declarations made by virtue of "the Act respecting extra-judicial oaths," the meaning and effect is not so clear. It might

seem that Statutory Declarations mean declarations made according to the *provisions* of Statutes. Now, a declaration made according to the *provisions* of the Statute respecting extra-judicial oaths, is not a Statutory Declaration until it is made before a person authorized by that Act to take it, viz., a Judge, Justice of the Peace, or Notary Public. Reading this enactment thus, the effect is nugatory. But in order to make it effective, "Statutory Declarations" must mean declarations in the *form* and upon the occasions prescribed by Statutes. Adopting this interpretation, this enactment means that Commissioners may take declarations in the form set out in the schedule to the Extra-Judicial Oaths Act, or in any other form or upon any occasion authorized by any Dominion or Ontario Act. R.S.O., Cap. 62, sec. 12, defines the powers of Commissioners, and it is there enacted that Commissioners have power to take affidavits and affirmations in matters before the Courts, or where affidavits or affirmations are authorized to be made by Statute. The new Act, therefore, in question, is practically an amendment of this section. In order to have the desired effect it must be taken to establish a form of Statutory Declaration in Ontario such as is now authorized by the Dominion Act. It remains to consider whether a person declaring falsely in such a declaration is guilty of a misdemeanor, for unless criminality attaches to a declaration, if false, it would be of no more value than an ordinary statement. The original Act, 37 Vict., Cap. 37, entitled "An Act for the suppression of voluntary and extra-judicial oaths," which remained in its original form up to the passing of the Revised Statutes of Canada in 1886, contained a provision "that if any declaration made in pursuance thereof be false or untrue in any material particular, the person making such false declaration shall be deemed guilty of a misdemeanour." This provision, it will be noticed, is not to be found in the Revised Statutes, and we must look elsewhere to find criminality imposed upon false declarations. The Perjury Act provides for this, enacting that everyone who wilfully and corruptly declares falsely in any declaration in any case in which by any Act or law in force in Canada or in *any Province* of Canada it is required or authorized that facts be verified by declaration, is guilty of wilful and corrupt perjury. Now, if by the enactment passed by the Ontario Legislature this last Session, declarations in the form and on the occasions set out in the Act respecting extra-judicial oaths are authorized to be taken by Commissioners, such declarations come within the purview of the Perjury Act, inasmuch as they are declarations authorized by an Act in force in a Province of Canada. And so it may be argued that in this somewhat roundabout fashion, declarations made before Commissioners will in future be valid, and criminality will attach to false statements made therein.

But this reasoning is unsatisfactory, for it cannot be said that a Statutory Declaration, *made before a Commissioner*, is made "by virtue of the Statute respecting extra-judicial oaths," as expressed in the form given in the Dominion Act, which form, it will be noted, is imperative. It should be expressed not only as made "by virtue of the Act respecting extra-judicial oaths," but also "by virtue of the Act passed by the Legislature of Ontario in the 53rd year of

Her Majesty's reign, entitled 'An Act with Respect to the Powers of Commissioners for taking Affidavits,'" but then we have a *form* not prescribed or authorized by any Statute.

Toronto, May 15th, 1890. J. E J.

[The decision in *Regina* v. *Monk* has caused a great deal of inconvenience to the profession and expense to suitors, and, so far as our opinion goes, unnecessarily so, as we doubt whether the learned judge arrived at a correct conclusion. The profession at least continued largely to use the services of Commissioners. The case, however, does not seem to have been appealed, and was followed in later cases. The Legislature has considered it best to make it plain that Commissioners are included within the Act. Our correspondent doubts whether the Ontario Act is sufficient to effect its object. We trust that it may be, so that the doubts as to the power of Commissioners to take declarations may be finally settled.—ED. C.L.J.]

Notes on Exchanges and Legal Scrap Book.

BANK ACCOUNTS AND THE STATUTE OF LIMITATIONS.—It is certainly not a well-known point of law that money left with a banker, and not drawn upon for six years, becomes at the end of that time the absolute property of the banker. Special attention is rightly called to this fact in the new edition of Chitty's Contracts as a "point of contract law seeming to require remedial legislation." Money deposited with a banker on current account is in law money lent to him. The contract between banker and customer is simply that of borrower and lender, with an obligation on the banker to honour the cheques drawn by his customer. If there is no payment of interest by the banker, nor any other acknowledgment by him that the debt is due, the right of the customer to recover the moneys which he has deposited with the banker will be barred after six years by the Statute of Limitations.—*Law Times.*

MONEY PAID UNDER ILLEGAL CONSIDERATION.—The law as to recovering back moneys paid under illegal contracts is in a most unsatisfactory state, as appears from the considered judgment of the Court of Appeal in *Kearley* v. *Thompson and Ward*, which we note elsewhere. There, £40 was paid to induce the defendants, acting as solicitors for a petitioning creditor, not to oppose a bankrupt's discharge. The bankrupt never came up for discharge, and it was sought to recover the money. Clearly the illegal contract had not been completely performed, but, nevertheless, the court held that the payer had no *locus pœnitentiæ*, the parties were *in pari delicto*, and the money must remain where it was. Some tribunal, some time or other, will have to deal with expressions used by Lord Justice Mellish and Lord Esher. The former said, in *Taylor* v. *Bowers*, 34 L.T.R.N.S., 938; 1 Q.B.D., 291: "If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out." The

latter said, in *Herman* v. *Jeuchner*, 15 Q.B.D., at p. 563; 53 L.T.R.N.S., 94: "In this case the illegal purpose has been wholly performed, and, *therefore*, the plaintiff cannot recover." Now it must be taken that, although the contract has not been wholly performed, money paid cannot be recovered back; and consequently, we suppose, if nothing is done under it at all the same rule applies.—*Law Times.*

A NOVEL CAUSE OF ACTION.—The courts have had very little consideration for us of late, and consequently we have felt that our columns were in danger of becoming dry. But just now several amusing cases have arisen to enliven us and our readers. In the English case of *Giles* v. *Walker*, one farmer sued another for allowing his adjoining land to become overrun with thistles, whereby, aided by the contributory negligence of the wind, the plaintiff's demesnes became infested with the noxious visitant, and he demanded the expense incurred in eradicating it. The defendant was condemned in the County Court to pay £3 therefor. The appellate court took a different view—as Artemus Ward said, "didn't see it in those lamps"—or, as one of our exchanges remarks: "Where, however, the negligence comes in is not clear, and the Divisional Court, to which an appeal was made, was somewhat more jealous of new actions. It would be very desirable no doubt if every one would keep his land in good order, and generally if our neighbours were all that we could desire. But there are unfortunately aberrations from this ideal, and the law does not always put them right. Negligence appears to indicate the omission to perform some duty, but hitherto no man has been under any duty to the general public to cultivate his land in a careful manner, and yet there must have been unthrifty farmers ever since our law began." There was no implied contract or obligation, as there was in the famous cabbage-seed case of *White* v. *Miller*, 71 N.Y., 118, where the Shakers innocently sold for Bristol cabbage a seed which had become impregnated by the wind with another seed from a neighbouring bed, causing a hybrid or barren result. Perhaps Walker was a Scotchman, and had an affection for thistles; or perhaps he was an——, but we must not let our sense of humor carry us extravagantly.—*Albany Law Journal.*

RIGHT TO CROSS-EXAMINE A SWORN WITNESS NOT EXAMINED IN CHIEF.—At the recent Taunton Assizes, before Stephen, J., with a common jury, in a dispute over work and labour done in making and saving hay, the counsel for the plaintiff called a witness into the box and had him sworn. The solicitor for the plaintiff then, having communicated something to the counsel, the latter stated his intention of not examining the witness, asked him no questions, and requested him to step down. Thereupon the counsel for the defendant asserted his right to cross-examine the witness before he left the box. The counsel for the plaintiff did not deny that the witness in question could speak as to the transaction. After hearing arguments on both sides the Court decided that, under the circumstances, the counsel for the defendant had the right to cross-

examine the witness. This point, decided on March 3rd, at Taunton, is somewhat unusual in practice, but apparently the decision is correct. The case which is nearest to it is that of *Wood* v. *Mackinson*, 2 M. & Rob., 273. There the counsel for the plaintiff called a witness, who went into the box and was sworn in the usual way, but before any questions were put to him the counsel said he had been misinstructed as to what this witness was able to prove, and that he would not examine him at all. Lord Coleridge, C.J. (then J.), in deciding that the witness was not liable to cross-examination, said: "The learned counsel explains that there has been a mistake, which consists in this, that the witness is not found able to speak at all as to the transaction which was supposed to be within his knowledge. That is, I think, such a mistake as entitles the party calling the witness to withdraw him without his being subject to cross-examination. If, indeed, the witness had been able to give evidence of the transaction which he was called to prove, but the counsel had discovered that the witness, besides that transaction, knew other matters inconvenient to be disclosed, and therefore attempted to withdraw him, that would be a different case." The report adds that the witness was accordingly withdrawn, and was subsequently called and examined in chief by the defendants as one of their witnesses.

The rule seems to be, that if a person other than the person intended, through some mistake or other, steps into the box and is sworn: *Clifford* v. *Hunter*, 3 C. & P., 16; *Simpson* v. *Smith*, Notts Summer Ass., 1882, M.S., referred to by Lord Coleridge, C.J. (then J.), in *Wood* v. *Mackinson*; or if a witness under simply a *subpœna duces tecum* steps into the box and is sworn unnecessarily by the officer of the court: *Rush* v. *Smith*, 1 C.M. & R., 94; or if counsel calls a witness who is sworn, and then learns that the witness is unable to speak as to the transaction in question, and that therefore there has been a genuine mistake in calling him: *Wood* v. *Mackinson*, 2 M. & Rob., 273; in all these cases, if there has been no examination-in-chief, the opposite side has not a right to cross-examine. But if, as was apparently the case in the recent Taunton incident, counsel, after calling a witness and allowing him to be sworn, then changes his mind, and puts no question to him, though he knows he can speak to the transaction, then the counsel on the opposite side can successfully assert his right to cross-examine.

In practice, therefore, the course would seem to be that the counsel who called the witness, allowing him to be sworn and refusing to examine him, would, if called upon by the other side, have to state his reason for not doing so. Then the court would have to decide whether the reason advanced brought the case within the exceptions.—*Law Times.*

TRUST AGREEMENTS.—The recent cases on "trusts" suggest, among other more important things, the question whether it is material that the subject-matter of the "trust agreement" be an article of necessity. In the case of the *People* v. *The North River Sugar Refining Co.*, 7 N.Y.Sup.Ct., 406, some twenty cases are cited and the result summed up in the following sentence: "In all these cases,

the reservation of the power to control the prices of necessary products, whether by express agreement or fair implication, has been condemned as unlawful." In *Dolph* v. *Troy Laundry Co.*, 28 Fed. Rep., 553, moreover, one of the reasons for holding a contract between two rival traders fixing a scale of prices, legitimate, was that washing machines are not articles of necessity.

In discussing the differences between a monopoly of a necessary and that of a non-necessary (if we may be allowed such a term), one must look at the question both from the side of the monopolist and from that of the public. Of course, the object of a monopolist is to raise prices, and thus enrich himself at the expense of the public. Now, it is undoubtedly true that, as prices are raised in the two cases we are considering, the quantity of the non-necessary demanded by the public will fall off much more rapidly than that of the necessary. In other words, a man cannot make so much money out of the former, because his sales must be more limited than would be the result in case of an equal rise in the price of the latter. Therefore, the monopolist cannot gain so much at the expense of the public; but does it follow that the public's real loss is less by the same amount that the monopolist's gain is less?

We must not forget that the man who ceases to buy an article because of the rise in price, or one who does not buy so much as he did at the lower price set by competition, suffers a loss as well as the man who buys the same amount as before but at a higher price. In the case of the non-necessary, more people prefer to take the loss by going without the article than in the case of the necessary; that is, the same proportion of the loss does not materialize in the form of gain to tee monopolist in the former as in the latter case.

We do do not mean to imply that the loss is as hard to bear in the one case as in the other, or that it will be to the interest of the monopolist to raise prices to the same extent in both cases; but we do wish to point out that there is injustice to the public in the one case as in the other, and that the ordinary method of measuring the amount of the injustice by the amount of the monopolist's gain has a tendency slightly to exaggerate the difference in hardship to the public between the two kinds of monopoly. No doubt there is a difference, but it is a difference merely in degree.

Turning to the reports, we find that in *The Case of the Monopolies*, a monopoly of the manufacture and sale of playing-cards, granted to an individual by Queen Elizabeth, was held void at common-law. There would seem to be no reason for drawing a distinction on this point between a monopoly granted by the State and one acquired by an individual or group of individuals. Moreover, the maxim, "Competition is the life of trade" (a maxim which seems to measure with some degree of accuracy the extent to which the law takes notice of political economy), undoubtedly covers the manufacture and sale of both necessaries and non-necessaries.

Upon the whole, it is much to be doubted whether the decision in the New York case would have been different if the "trust" had been for the manufacture of playing-cards instead of the refining of sugar. The particular case before the court was the monopoly of an article of necessity, and we must conclude that

only the cautious habit of not deciding more than needful for the disposition of the case in hand led the court apparently to lay down what would seem to be an unnecessary limitation.—*Harvard Law Review.*

NATURAL RIGHTS.—There are at least three well-recognized natural rights —the right to support of land,* the right to unpolluted air, the right to running water.† These rights have often been called natural easements,‡ from a mistaken notion that they are a benefit in or over the land of another — the common attribute of easements. They are, however, nothing more than rights of property growing out of certain natural conditions of land, and the rights incident to any one parcel do not extend beyond the boundaries of that parcel.

The right of support is not a right to have the adjoining owner's soil *kept* in in its natural condition, but a right to have one's own soil *left* in its natural condition;§ the right to unpolluted air is simply the right to have the air over one's own soil remain in its natural purity; the right to running water confers no right to control its course or use, either above or below one's own land, provided its natural course and condition upon¶ one's own land remain unchanged.*

An interference with my natural rights is but an interference by another with the natural condition of my land. If, through the act of another, less water runs over my land than formerly, or if the air over my premises is polluted, or if the surface of my soil is changed, these natural conditions are altered, and, as a result, my natural rights are infringed. In other words, these rights are rights in one's own property—*corporeal* rights.†

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* Lateral or subjacent. *Humphries* v. *Brogden*, 12 Q.B., 739.

† "It—namely, the right of support—is analogous to the flow of a natural river or of air." Per Willes, J., *Bonomi* v. *Backhouse*, Ellis, B. & E., 622, at p. 654.

‡ "Natural rights are a species of easements." Goddard on Easements (Am. ed.), p. 3.

§ *Backhouse* v. *Bonomi*, 9 H.L.Cas., 503; *Mears* v. *Dale*, 135 Mass., 508; *Mayor of Birmingham* v. *Allen*, 6 Chy.D., 284.

The plea in *Flight* v. *Thomas*, 10 A. & E., 590, that "for the full period of twenty years' defendant "had enjoyed the advantage of having and using a certain mixen in and upon the said premises," *held* insufficient to support a prescriptive right. Per Lord Denman, C.J. "The plea may be completely proved without establishing that right. The nuisance may never have passed beyond the limits of the defendant's own land."

¶ Or *along*. "Lateral contact is as good *jure naturæ* as vertical." Per Lord Selborne, *Lyon* v. *Fishmongers' Co.*, 1 App.Cas., 662, at p. 683.

* "I apprehend that a proprietor may, without any illegality, build a mill-dam across a stream within his own property, and divert the water into a mill-lade, without asking leave of the proprietors above him, provided he builds it at a point so much below the lands of those proprietors as not to obstruct the flowing away of water as freely as it was wont; and without asking the eave of the proprietors below him, if he takes care to restore the water to its natural course before it enters their land." Per Lord Blackburn, *Ewing* v. *Colquhoun*, 2 App.Cas., 839, at p. 856.

† "The right to have a stream flow in its natural state without diminution or alteration is an incident of property in the land through which it passes." Per Parke, B., *Embrey* v. *Owen*, 6 Ex., 353, at p. 368.

Actual *damage*, in the sense of diminution of value for the uses to which the land is actually put, is not essential to the infringement of a natural right. Thus by the uniform current of decisions both in England* and America,† it has been held that an action may be maintained for a violation of the right of support or of rights in running water, although the land is occupied for no beneficial purpose whatever.‡

It has also been held that it is no justification for further pollutions that the water or air is already unfit for use.§

When the term "injury" or "actual injury" is used in the cases, it must be understood in its legal sense of "violation of a right"—the right being the absolute right of property already described.

The true test of the infringement of this absolute right would seem to be, not whether there is damage, but whether there is such a disturbance of air, water or soil as is perceptible to the ordinary man under the circumstances—"such as can be shown by a plain witness to a plain common juryman."¶ "If, in the course of nature, the thing itself is so imperceptible, so slow, and so gradual, as to require a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation."* What would be a sensible disturbance to property situated in one place would be none to property situated in another, and a disturbance hitherto imperceptible may become perceptible when the land is used for a different purpose.†

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* "In *Orr Ewing* v. *Colquhoun* (2 App.Cas., 839, at p. 854), Lord Blackburn points out that the case of *Mason* v. *Hill* (3 B. & Ad., 304) settled the law that the proprietor of land on the bank of a natural stream above the flow of the tide has, as incident to his property in the land, a proprietary right to have the stream flow in its natural state, neither increased nor diminished, and this quite independently of whether he has as yet made use of it, or, as it used to be called, appropriated the waters." Per Cave, J., *Ormerod* v. *Todmorden*, etc., *Co.*, 11 Q.B.D., 155, at p. 160.

† "Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than, whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages in vindication of his right, if no other damages are fit and proper to remunerate him." Per Story, J., *Webb* v. *Portland Manf. Co.*, 3 Sumn., 189, at p. 192.

‡ *Parker* v. *Griswold*, 17 Conn., 288; *Miller* v. *Miller*, 9 Pa. St., 74; *Wheatley* v. *Chrisman*, 24 Pa. St., 298; *Newhall* v. *Ireson*, 8 Cush., 595; *Franklin* v. *Pollard*, 6 So. Rep. (Ala.), 685. The same has been held in regard to pollution of the air, in *Dana* v. *Valentine*, 5 Met., 8; but see expressions contra in *Sturges* v. *Bridgman*, 11 Chy.D., 852.

§ *Crossley* v. *Lightowler*, L.R., 2 Chy., 478.

‖ "The pollution of a clear stream is to a riparian owner below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury without damage." Per Fry, J., in *Pennington* v. *Brinsop Hall Coal Co.*, L.R., 5 Chy.D., 769, at p. 772.

¶ Per James, L.J., in *Salvin* v. *North Brancepeth Coal Co.*, L.R., 9 Chy., 705, at p. 709.

* Ibid.

† *Sturges* v. *Bridgman*, 11 Chy.D., 852.

Whether, when the purity of the air or the quantity of running water* is in question, the law imposes an additional test, may be doubted; if so, it is done in the interests of public policy, and does not affect the nature of the right.

Several important consequences flow from considering these rights as corporeal. First, they cannot be *granted away*. These rights are rights against all the world, to prevent interference with property; and if they could be granted away, the only result would be that the grantee, having himself no rights over his grantor's land, would have the right to prevent others from interfering with its natural condition. The right to sue for a nuisance is no more severable than the right to sue for a trespass.

Secondly, they cannot be *destroyed*. Property cannot exist without the incidents annexed to it by law for its protection.

Thirdly, not being rights over the land of another, they cannot be *released*.

Fourthly, being corporeal rights, easements may be granted in them. The right to maintain a nuisance is in strictness a right in or over another's land, and is subject in every respect to the usual laws governing the origin, continuance, and destruction of easements.†—*Harvard Law Review*.

MAY A NEWSPAPER REPORT SLANDER?—Of course a newspaper *may*; but will it be liable in damages if it does? It is clearly settled law that not only is the author or originator of a defamatory statement liable for it, but so also is any one who repeats it. Now at common law a newspaper is in no better position than any private individual; and therefore, apart from recent legislation, a paper which reported slanderous statements made at a public meeting could be sued for damages by the person whose reputation was injured by the slander. But the Libel Act of 1888 (R.S.O., c. 57,s.7), holds an ægis over the newspaper press, and to some extent protects it. But to what extent? This was the question which arose in the recent case of *Kelly* v. *O'Malley*, perhaps better known as the "Star" libel case.

The facts can be briefly stated. Mr. Kelly was addressing a public meeting, his audience was not very well disposed towards him, and frequently interrupted his flow of oratory with remarks of a derogatory nature—of course the ubiquitous "Starman" was present taking notes. Now one characteristic feature of the new journalism is, that instead of reporting the speeches made at a meeting and

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* The English law would seem to give riparian owners an easement of *reasonable diminution* not granted to non-riparian proprietors. See *Ormerod* v. *Todmorden*, 11 Q.B.D., 155; but cf. contra, *Miller* v. *Miller*, 9 P.St., 74; *Wheatley* v. *Chrisman*, 24 Pa.St., 298.

There is no such easement of pollution, however. See *Blair* v. *Deekin*, W.N. (1887), 148.

† "It—viz., the right to deprive land of support—was the grant of a right to disturb the soil from below and to alter the position of the surface, and is analogous to the grant of a right to damage the surface by a right of way over it." Per Lord Wensleydale, *Rowbotham* v. *Wilson*, 8 H.L.C., 348, at p. 362.

"There is no claim of an easement unless you make it appear that the offensive smells had been used for twenty years to go over to the plaintiff's land." Per Lord Denman, C.J., *Flight* v. *Thomas*, 10 A. & E., 590.

commenting upon them "in another column," *e.g.*, in a leader, it publishes a narrative account of the proceedings at the meeting, interspersing its own criticisms. The great point now-a-days is to render everything spicy, and a long speech relieved with pretty frequent criticisms of a racy and sprightly character is much more likely to be read through than a plain unvarnished tale. It is, perhaps, a question if these narrative reports can possibly be kept free from all trace of the writer's particular bias, certainly the temptation to twist the actual facts to suit one's private view is very strong, and for ourselves we prefer the good old plan of keeping separate the comment and the matter commented on.

The "Star" then published an account of the meeting, including the uncomplimentary remarks made by individuals amongst Mr. Kelly's audience, and Mr. Kelly sued the "Star" for damages for libel, alleging that the effect of the report was to charge him with dishonesty, his particular complaint being against the reporting of the audience's observations. The "Star" took refuge under the Libel Amendment Act, 1888 (R.S.O., c. 57, s. 7). There seems to have been no question about the slanderous nature of the words reported, and the defence rested simply on the ground that the report was a fair and accurate report of what had taken place at a public meeting, which was a matter of public importance, and that it had been published for the public benefit without malice.

The Act provides that a report in a newspaper of the proceedings of a meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, shall be privileged, if the report is fair and accurate, the matter is not blasphemous or indecent, and the matter complained of is of public concern. But the Act is not to protect the publication of any matter not of public concern, and the publication of which is not for the public benefit, and the privilege may be refuted by proof of express malice.

The only questions in the "Star" case were—(1) Was the report fair and accurate? (2) Was the matter complained of, of public concern? (3) Was the publication of it for the public benefit? We confess we are unable to understand why the two expressions, fair and accurate, should have been used. Are they not redundant? If the report is accurate, how can it be otherwise than fair? If it is fair, it can only be fair because it is accurate. As Baron Huddleston said, it is very difficult to say what is a fair and accurate report. We suppose it is a question of fact in each particular case. Into this, however, we will not go. It seems to have been found that the things mentioned in the "Star" report did take place in fact, and that the observations of the audience were slanderous. What we more particularly wish to do is to criticise some of Baron Huddleston's observations in his directions to the jury.

As far as we understand the matter, the "Star," in order to bring itself within the protection of the Act of 1888, had to show (1) that the meeting was public, *i.e.*, that it was *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of a matter of public concern. This point does not seem to have been in dispute. (2) That the report was fair and accurate. (3) That the matter published was of public concern. (4) That the publication of the report was for the public benefit.

Now Baron Huddleston, in our view, made one clear misstatement of the law. He said in effect that the Act did not protect a paper which published slanderous matter, although uttered at a public meeting. He was undoubtedly wrong here. If no slanderous matter was reported, there would be no need for protection, and the main object of the Act was to protect a newspaper which, *for the public benefit*, published matter to which exception might be taken as being slanderous. This is the sole reason for the existence of the Act. No protection is needed when there is no liability.

Again, Baron Huddleston seems to have thought that the Act only protected reports of speeches made at public meetings by the, so to say, official speakers, and not reports of remarks made by members of the audience. He said: "If a newspaper chooses to publish defamatory matter about anybody, though actually uttered at a public meeting, but which has nothing to do with the objects of the meeting, then it cannot shield itself behind the Act." We submit that this is a wrong direction as to the law. The Act protects fair and accurate reports of the "*proceedings*" at a public meeting, and surely the proceedings at a meeting comprise everything that takes place and everything that is said there, no matter by whom? In our opinion he ought to have directed the jury that if the remarks reported were not of public concern, and if the publication of the remarks was not for the public benefit, then the newspaper would not be protected by the Act. In our opinion Baron Huddleston has altogether failed to comprehend the Libel Act, 1888, and if the "Star" does not take proceedings to obtain a new trial, we shall be very much surprised.

Both counsel and judge seem to have treated the expressions "of public concern" and "for the public benefit" as if they were both equivalent to "of public interest." Now the Act does not use the word interest. It provides that the matter reported must be of public concern, and that the publication of it must be for the public benefit. There is surely a distinction between the words concern, benefit, and interest: the public may be interested in a matter which cannot concern it, and the knowledge of which cannot benefit it: the public is very interested in scandalous matter which affects only the parties immediately connected with it, and the knowledge of which is calculated to do more harm than good. And we do not think that it absolutely follows that because a matter concerns the public, it is necessary for the public benefit that it should be made known. There is such a thing as secret service. The first question that should be asked when considering whether a report is protected under the Act of 1888 is: Is it for the public benefit that a report of the matter should be published at all? If this is answered in the negative, the case is at an end. If it is answered in the affirmative, then follows the question: Was the matter published of public concern? If nay, there is no protection. If yea, then inquiry must be made into the fairness and accuracy of the report, and as to whether the meeting was a public meeting within the Act.

Though but small damages were awarded against the "Star," the case is one of great importance. The style of the "new journalism" is spreading to the older papers, and everywhere there is a disposition to throw the light of publicity

on everything that takes place. So long as matters of public concern only are dealt with, and the individual right to privacy concerning matters in which the public is not concerned is respected, we see no objection to this bringing forth everything into the full light of day. The old struggle to muzzle the press is practically over, but parties interested in keeping matters quiet are ever ready to put a forced construction on an Act of Parliament which aims at the wise object of allowing the fullest liberty without undue license.

The answer, then, which is to be given to the query with which we head these remarks is—Yes; if the slander has been uttered at a public meeting, the matter is of public concern, the publication is for the public benefit, and the report is fair and accurate.—*Law Notes.*

THE DUTIES OF COMMISSIONERS TO ADMINISTER OATHS.—The numerous and important body of commissioners to administer oaths will naturally turn to the charter to which they owe their existence in their surprise at the remarks made by Mr. Justice Kay last week. They will find in the Act 16 & 17 Vict., c. 78, s. 2, "that it shall be lawful for the Lord Chancellor, from time to time, to appoint any persons practising as solicitors within ten miles from Lincoln's-Inn Hall at their respective places of business, to administer oaths and take declarations, affirmations, and attestations of honour in Chancery, and to possess all such other powers and discharge all such other duties as 'the masters extraordinary in Chancery' previously did; and such persons shall be styled 'London Commissioners to administer oaths in Chancery;' and they shall be entitled to charge and take a fee of one shilling and sixpence for every oath administered by them, and for every declaration, affirmation, or attestation of honour taken by them, subject to any order of the Lord Chancellor varying or amending the same." Then, under s. 84 of the Judicature Act, 1873 (36 & 37 Vict., c. 66) all commissioners to take oaths or affidavits in the Supreme Court are appointed by the Lord Chancellor. Appointments are open to all practising solicitors on formal application to the Chancellor, accompanied by certificates; the condition being that the applicant shall have taken out certificates for the six consecutive years immediately preceding the application. There are also one or two of the Rules of the Supreme Court which have a bearing upon the matter. First, by Order XXXVIII., r. 5: Every commissioner to administer oaths is called upon to express the time when and the place where he takes any affidavit, or the acknowledgment of any deed, or recognisance; otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled without the leave of the Court or a Judge; and every commissioner is bound to express the time and the place where he does any other act incident to his office. Secondly, by Rule 13 of the same Order: "Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the

officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court or a Judge is otherwise satisfied that the affidavit was read over to, and appeared to be perfectly understood by, the deponent." An illustration of this rule came before Mr. Justice Kay five years ago in *Re Longstaffe; Blenkharn* v. *Longstaffe*, 52 L. T. Rep. N. S. 681, where the deponent could only read imperfectly, and was able to write nothing but his own name. The affidavits had not been read over in the presence of the commissioner, and therefore consequently were struck off the file. This completes the charter laid down by statute and rules for the conduct of commissioners to administer oaths. It is hardly necessary to point out that, on the principle *Expressio unius est exclusio alterius*, when a commissioner is expressly ordered to state the time and place of swearing, and to follow a particular method with regard to illiterate deponents, he is surely justified in assuming that no special precautions are to be taken with capable and educated deponents.

It may be added that the instructions given in Daniell's Chancery Practice prescribe two questions, and two questions only, the first being, "Is that your name and handwriting?" and the second being, "You do swear that the contents of this your affidavit are true?"

Now, many a commissioner who is thoroughly conversant with the Acts and rules already mentioned will be disagreeably surprised with the remarks attributed to Mr. Justice Kay in the case of *Bourke* v. *Davis* on the 3rd December last. The Judge called the attention of the Profession to a matter of importance which had been forcibly brought to his notice in that case—that is, the duty of commissioners to administer oaths where a witness is swearing to the contents of an affidavit. In the case before the Court certain witnesses contradicted the statements made by them in affidavits sworn in the cause, and in such a startling manner that the Judge required an explanation of the mode in which the affidavits were sworn. The commissioner before whom they were sworn attended the Court, and in answer to questions from the Bench, he said that he went with a solicitor in the cause to the houses of the several witnesses: that the affidavits were not read over in his presence, and that he took no means to ascertain whether the witnesses knew to what they were swearing. Mr. Justice Kay then expressed his strong disapproval of such a practice, saying that "it is the commissioner's duty before he administers the oath to satisfy himself that the witness does thoroughly understand what he is going to swear to; and he should not be satisfied on this point by anyone but the witness himself." It is to this reason that Mr. Justice Kay describes the rule which has come down from Lord Hardwicke's day, that the Court does not accept an affidavit sworn before the solicitor in the cause, or before his clerk, although either may be a commissioner: *Re Hogan*, 3 Atk. 812; *Wood* v. *Harper*, 3 Beav. 290; *Duke of Northumberland* v. *Todd*, L. R. 7 Chy. D., 777. The Court requires the security of an independent commissioner, and it is obvious, said the Judge, that it ought not to take only the statement of a solicitor in the cause that the witness knows what is in the affidavit. "When, as in *Bourke* v. *Davis*, many of the witnesses were in a humble position of life, I do not see how the commissioner can be

satisfied without having the affidavits read over in his presence. If an educated man says to him, 'I have read over this affidavit, to the truth of which I am going to swear, and all the statements are accurate,' that may in some cases be sufficient. But I confess I wish it were made more incumbent upon the commissioner in every case to go through the affidavit with the witness, and to refuse to take his oath until he was satisfied that the witness understood and intended every statement in it. A great deal of false swearing would be prevented if this were done."

This is the substance of remarks which have raised so much comment. Most of that comment has been adverse to the sense in which Mr. Justice Kay spoke. It cannot but be admitted that much of what is sworn in affidavits ought not to be sworn. On the other hand, it is absolutely impossible to throw upon the commissioners to administer oaths, while paid as they are at present paid, any more responsibility than they may at present have. In the case of an acknowledgment of a deed by a married woman the commissioner is required to satisfy himself that the married woman understands the deed which she acknowledges, and its exact effect upon her property, and the fee allowed by the rules is 13s. 4d., which is not more than sufficient for the time and labour. Again, when a solicitor has to satisfy himself that the grantor of a bill of sale understands the effect of the bill which he is executing, as to which see s. 10 (1) of the Bills of Sale Act, 1878 (41 & 42 Vict., c. 31), he charges considerably more than eighteen pence for his services. If the fee of eighteen pence only is to be paid for the duty which Mr. Justice Kay suggests—that is, the commissioner satisfying himself that the witness thoroughly understands the purport of his affidavit—then we may safely predict that no solicitor of any standing will undertake the onerous duties of a commissioner of oaths. The result will be that the duties, if performed at all, will be performed by a solicitor of lower standing and more needy position. This will certainly not conduce to greater regularity or to any more real observance of the oath. Besides, it must be remembered that in country towns there are often but two solicitors who are also commissioners. It will often happen that each of these two is engaged either for plaintiff or defendant in a case, and the affidavits of the defendant's witnesses will necessarily be sworn before the solicitor to the plaintiff. However honourable a man that practitioner may be, the process will be in effect reading his opponent's brief aloud to him, maybe before he has drawn his own. It is certainly a novelty to the Profession that commissioners should be fixed with any such duty as that suggested in *Bourke* v. *Davis*. Solicitors have had many new things at the hands of Mr. Justice Kay, but they have never had such a startling novelty as this. That a busy professional man should be called upon first, to understand himself, then, to make some ignorant, "oldest inhabitant" understand, the effect of an affidavit which extends perhaps to hundreds of folios, and should be asked to do this difficult and responsible work for the sum of eighteen pence, is a monstrous thing. And we, as at present advised, do not believe that there is any warrant in statutes or rules for Mr. Justice Kay's proposition. Certainly, on the principle that *Expressum facit cessare tacitum* it would be excluded. With all submissions to the learned Judge, we

contend that it is an unwarranted and an incorrect statement of the law. The line of decisions which begins with *Re Hogan (ubi sup.)* are certainly no authority for it.—*Law Times.*

EXTENT OF CROSS-EXAMINATION IN CRIMINAL CASES ON COLLATERAL MATTER.—In a criminal case a witness for the defence, on cross-examination, and without objection, testified that he had collected money in Seattle, Tacoma, and Portland, to assist in the defence; that he had raised between $800 and $900 for that purpose; that the witness had contributed about $500 to that fund. The witness was then asked by the district attorney, "Who were the parties here in Portland who contributed to that fund?" To this question an objection was made, but overruled and an exception taken. Witness answered: "Sliter." The witness then testified, under like objections and exceptions, that Sliter and McNamara contributed $100; that John Russell kept a saloon on Washington street, and contributed to the fund; that "The Mascot" also contributed; that Paul Fuhr also contributed $100, but not in Portland; that Frenchy Gratton contributed in the neighborhood of $200, and that his business was gambling. None of the parties referred to were witnesses in the case, nor were they in any manner connected with the trial any further than contributing sums of money to aid the defendant, who was on trial for the murder of Emil Weber.

As appears from the dissenting opinion of Lord, J., the record disclosed "that the gamblers of the city of Portland were divided into two factions—one headed by the defendant, Olds, the other by Emil Weber—between whom there existed a fierce feud, which finally culminated in the death of Weber at the hands of the defendant, Olds." And it further appears that the witness, a portion of whose cross-examination by the district attorney has been given, was "a gambling man," and, being witness for the defence, it is fair to presume that he belonged to the faction of gamblers headed by the defendant, Olds.

The question presented to the Supreme Court was, "whether or not the cross-examination above referred to, and to which objection had been taken, was such error as called for a reversal of the judgment of the court below, the defendant having been convicted of murder in the first degree, and sentenced to death."

The court, in passing on this question says (*State* v. *Olds*, 22 Pac. Rep., 940): "The state had the right, on the cross-examination, to ask this witness anything that would show his interest in the result of the trial, and anything he did in aid of the defendant about the trial, for the purpose of enabling the jury to properly weigh his evidence, and to intelligently pass upon his credibility. This was done without objection. . . . Was it competent for the State to prove, as independent facts, that certain saloonkeepers and gamblers in the city of Portland contributed in making a defence in this case? This question may be answered by referring to one or two of the plainest and simplest elementary rules of the law of evidence. 'And it is an established rule, which we state as the first rule governing the production of evidence, that the evidence offered must correspond with the allegations, and be confined to the point in issue.' 1 Greenl. on Ev., Sec. 51. A few cases may be cited in which this rule has been indirectly or

incidentally applied: *Campbell* v. *State*, 8 Tex. App., 84; *Watson* v. *Com.*, 95 Pa. St., 418; *Cesure* v. *State*, 1 Tex. App., 19; *Pinckford* v. *State*, 13 Tex. App., 468; *State* v. *Lapage*, 57 N. H., 245; *Farrar* v. *State*, 2 Ohio St., 54; *State* v. *Miller*, 47 Wis., 530, 3 N. W. Rep., 31; *Com.* v. *Campbell*, 7 Allen, 541; *Hall* v. *State*, 51 Ala., 9; *Brock* v. *State*, 26 Ala., 104; *Rogers* v. *State*, 62 Ala., 170. And it is equally well settled that this rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute."

But a strict enforcement of this rule would exclude all evidence of collateral facts, and such as had not a direct or indirect tendency to prove the matter in dispute. Evidence of this character, however, is not admitted for the purpose of proving or disproving the fact in dispute, but for the sole purpose of affecting the credibility of the witness, and the weight to be given by the jury to his evidence; and while it is undoubtedly true that the general rule is that the cross-examination will be confined to matters and things about which the witness testified on his examination in chief, yet "where a party is a witness, or an unwilling witness is under examination, the Trial Court may, in its discretion, allow the cross-examination to take a wider range, which will be reviewed only for abuse": *Hanchett* v. *Kimbark*, 7 N. E. Rep., 491, 118, Ill., 121; see, also, *Lawson* v. *Henderson*, 14 Pac. Rep., 164.

And in *Stevens* v. *State*, 3 Tex. L. J., 139, it is said: "Cross-examination should ordinary be restricted with respect to the interest, motives and prejudices of a witness, his means of knowledge, his powers of discernment, memory, and the like." The extent to which a cross-examination, relating to collateral matters, may be carried, is within the discretion of the presiding judge: *State* v. *Rollins*, 1 East. Rep., 584.

Judge Thompson, in his excellent work on "Trials," quotes from *Watson* v. *Twombly*, 60 N. H., 491, 493, as follows: "How far justice requires a tribunal to go from the issue for the trial of collateral questions; how much time should be spent in the srial of such questions; what evidence may be excluded for its remoteness of time and place; and what evidence is otherwise too trivial to justify a prolongation of the trial—are often questions of fact to be determined at the trial." And he then adds: "It follows, where this rule prevails, that the decision of the judge, in the exercise of this discretion, is not subject to review, except in cases of manifest injustice or abuse": 1 Thompson on Trials, Sec. 464.

Another question that arises is this: Should a judgment be reversed, a new trial awarded, and great additional expense thereby incurred unless there is at least reasonable ground to believe that the result of the new trial will be other than that of the former; or that the evidence admitted over objection was weighed by the jury and affected their verdict?

"It is well settled that a new trial will not be awarded because illegal testimony was admitted, if wholly irrespective of that testimony, there was plainly and obviously sufficient evidence to justify the finding": *Stephen* v. *Crawford*, 44 Am. Dec., 683.

And certainly the admission of irrelavent testimony on a collateral matter will not justify the granting of a new trial, if the fact sought to be proved was not controverted: *Crosby* v. *Fitch*, 31 Am. Dec., 745.

In a criminal case the court says: The range of cross-examination, and extent to which such questions should be allowed, depend upon the appearance and conduct of the witness, and all the circumstances of the case, and necessarily must be regulated by a sound judicial discretion. It is only where there has been an abuse of this exercise of the discretion by the court, resulting to the prejudice of the party complaining, that error will lie": *State* v. *Pfefferle*, 9 Crim. Law Mag, 222, 36 Kans., 90. See, also, *State* v. *Bacon*, 13 Or., 143.

The case of *State* v. *Miller*, cited and relied upon by the court in the *Olds* case, is not authority for the rules there laid down. In the Miller case two questions were submitted to the court for decision, as follows: First, Did the Trial Court err in permitting the letter written by Miller at the police station, and at the request of the officers there, after he was arrested, to be admitted in evidence and given to the jury? Second, Did said court err in admitting testimony to show that the defendant had been guilty of forgery and larceny? 3 N. W. Rep., 31, 47 Wis., 530.

Each of these questions was answered in the affirmative; but there was no question raised or passed upon relating to the cross-examination of a witness upon collateral matter, or to what extent such cross-examination might be permitted.

The case of *State* v. *Lapage*, 57 N.H., 245, 24 Am. Dec., 69, is not in point. It simply decides that, when the defendant was on trial for murder and the prosecution attempted to show that the murder was committed in an attempt to commit rape, evidence that the prisoner had committed rape upon another person was incompetent. This is a well-considered case, but it does not touch upon the cross-examination of a witness to show prejudice against the party against whom he testifies, or interest in the party calling him, for the purpose of affecting his testimony, or the weight to be given thereto.

The case of *Com.* v. *Campbell*, 7 Allen, 545, 83 Am. Dec., 705, also cited in the Olds case, holds that a party cannot be proved guilty of one offence by evidence that, at a different time and place, he was guilty of committing a similar offence, and is not in point.

In *Farrer* v. *State* it is held that "on an indictment charging the prisoner with poisoning A in December, 1851, it is error to permit evidence in chief to show that she poisoned B in the month of August previous": 2 Ohio St., 54.

It is therefore apparent that four of the cases cited by this court do not sustain its contention, or, in other words, are not authority for the doctrine there laid down. The other cases cited I have not at present before me.

In the Olds case, Strahan, J., speaking for the majority of the court, says: "For what purpose was such evidence offered? Manifestly for the purpose of arousing a prejudice in the minds of the jury against the prisoner, and of exciting a feeling of hostility against him, growing out of the fact that lawless and immoral people were actively interesting themselves in his defense. Of course, we

cannot say that such evidence did have that effect upon the minds of the jurors, but such was its tendency, and it is sufficient for this case that it might have had that effect " : 22 Pac. Rep., 941.

And, yet, it appears to me that nothing is more natural than that gamblers, belonging to the faction of which Olds was the acknowledged head, and saloon keepers who were the friends of the gamblers, and in whose saloons gambling was frequently carried on, should contribute money for the defence of Olds when he was on trial for the murder of the leader of the rival faction of gamblers; and certainly no juror would weigh in the balance against human life, the fact that the friends of the defendant (vile, degraded, and immoral though they might be), contributed to his defence. As was said by Lord, J., dissenting: " The truth is, the fact of contributing to the defence of a man, especially when on trial for his life, is not in itself an immoral act. It has been often done, and by all classes of men, and finds its source in the instincts of our common humanity to relieve those to whom we are attached " : 22 Pac. Rep., 943.

Lord, J., further said: " The witness under examination, out of whom these facts were elicited, testified in his direct examination that he was a gambling man, and, on his cross-examination, that he had contributed money for the defence of Olds, and collected money from others for that purpose, and to this extent the testimony is admitted to be legitimate cross-examination. So that we have the fact that money was contributed by the witness before the jury, and that he was a gambling man, brought out or proved by the defendant's witness. If such matter operates to affect the standing of the defendant in the estimation of the jury, the harm was already done, and the subsequent evidence elicited was, at the most, only cumulative of what had been regularly and legitimately proven " : 22 Pac. Rep., 943.

That the view taken by Judge Lord of this matter was the only tenable one that could be taken, must be apparent to any reasonable and unprejudiced mind. The opinion of the majority of the court was that the tendency of such evidence was prejudicial to the defendant, and that it was sufficient for the case that it might have had that effect. Cases are not usually tried upon possibilities, but here we have a judgment reversed because there is a bare possibility that the evidence may have had a prejudicial effect upon the minds of the jury. This case was remanded to the court below. The time of that court was occupied for several days in a new trial, and great additional expense was thereby incurred in order that the criminal might be punished for his violation of the law, when the evidence in the first instance was abundantly sufficient to justify the verdict of the jury, even if the evidence objected to had been wholly stricken out or never received. Cases are not determined in Trial Courts on possibilities, and courts of last resort are not warranted in reversing a judgment upon the possibility that the defendant may have been innocent (for there is always a possibility that this may be the case), or that the defendant may have been prejudiced by the admission of evidence of some collateral fact.—*The Advocate.*

DIARY FOR MAY.

1. Thu....St. Philip and St. James.
2. Fri.....J. A. Boyd 4th Chr., 1881.
3. Sat.....Mr. Justice Henry died, 1688. Last day for filing papers and fees for final exam.
4. Sun....*Fourth Sunday after Easter*
6. Tues...Supreme Court of Canada sits. Lord Brougham died 1868, æt. 90.
10. Sat.....Indian Mutiny 1857.
11. Sun....*Rogation Sunday.*
13. Tues...Court of Appeal Sits. General Sessions and County Court Sittings for trial in York begin. Solicitors' Examination.
15. Thu....Barristers' Examination.
18. Sun....*Sunday after Ascension.*
19. Mon....Easter Term commences. High Court Justice Q.B. and C.P.D. Sittings.
21. Wed....Confederation proclaimed 1867. Lord Lyndhurst born, 1772.
24. Sat.....Queen Victoria born 1819.
25. Sun....*Whitsunday.* Princess Helena born 1846.
27. Tues....Habeas Corpus Act passed 1679.
28. Wed....Battle of Fort George 1813.
29. Thu....Restoration of Charles II., 1660.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Chancery Division.

STREET, J.] [March 20.

DUGGAN *v.* LONDON AND CANADIAN LOAN AND AGENCY CO. *et al.*

Assignment of shares of stock—"In trust"—Pledge by assignee—Redemption by owner.

Plaintiff assigned certain shares of stock to his brokers as security for advances, the assignment being made "in trust." The defendant company subsequently became the holders of the shares as security for advances (greatly exceeding in amount what was due by plaintiff to the brokers) made to the brokers, by assignment from a holder who also held "in trust." The company made no enquiry as to what, if any, trust existed, and plaintiff had no notice that his stock was being so dealt with.

Held, that the plaintiff was entitled to recover his stock upon payment of the amount due by him to the brokers.

McCarthy, Q.C., and *Moss*, Q.C., for the plaintiff.

Arnoldi, Q.C., for the company.

Cassels, Q.C., for the defendant Turnbull.

Ritchie, Q.C., for the defendant Scarth.

ROBERTSON, J.] [April 21

IN RE FRANCES J. MOORE TRUST.

Moneys invested in Brazil — Application for leave to apply to foreign court—Proceedings before same—Form of order.

A petition presented on behalf of F. J. M., entitled to a sum of money, part of her father's estate, represented by Brazilian bonds—father having died in Brazil. The petitioner married when an infant in Prince Edward Island, but executed (by power of attorney) an ante-nuptial settlement in Rio de Janeiro, approved by the Juiz de Orphaos (Court of Orphans) of that city; the fund was thereupon retained by the foreign court until F.J.M. attained her majority. On application there for payment, the foreign court refused to pay the money to the petitioner in consequence of the marriage settlement, which limited the fund to issue of the marriage, subject to mother's right to enjoy the income; but would pay money into an English court having jurisdiction over the parties, and upon such court granting leave to petitioner to apply to have the fund converted and remitted to the English court.

W. F. Burton moved upon petition for such an order as was required by the foreign court, and for leave to apply to the Juiz de Orphaos in Rio de Janeiro to convert the securities and remit money to this Province.

Hoskin, Q.C., for the infants, approved, but order should be permissive and terms to be approved by the foreign court; order made to be translated into Portuguese language; money, if paid into court, to remain there subject to further directions.

FERGUSON, J.] [April 30.

Re WARDELL AND WILSON.

Vendor and purchaser—Power of sale in a mortgage—No notice required.

In an application under the Vendor and Purchaser Act, in which the vendor was making title under a power of sale worded as follows: "Provided that the said mortgagees on default of payment for one month may, without giving notice, enter on and lease or sell the said lands," it appeared default was made January 17th, and the mortgagor gave up possession to the mortgagee; notice was given January 18th, and an abortive sale had March 1st, the reserve

bid not being reached. On March 15th an agreement for sale by private contract was made.

Held, that the vendor could make a good title.

N. McDonald for the vendor.

W. B. Doherty for the purchaser.

Law Students' Department.

EXAMINATIONS BEFORE EASTER TERM, 1890.

SECOND YEAR.

Contracts.

1. If a contract is to be partly performed within a year, and partly after the expiration of a year, is any writing required? Why?

2. What test is there to determine whether any particular contract is one for work and labour or for sale of goods? What practical effect is there in the difference?

3. What difference is there between a ratification after full age of a promise made during infancy, and a new promise to the same effect as the old one as regards the formalities to be observed?

4. Will part performance by the plaintiff of a verbal agreement with a corporation which ought to have been under the corporate seal but was not, entitle him to recover against the corporation? Why?

5. In what way is the question of any practical importance whether a verbal contract within the Statute of Frauds is void or only unenforceable?

6. What is the rule as to varying a written contract by verbal evidence? Does it make any difference if the contract is not required to be in writing? Why?

7. Is it the price or value of the goods which determines whether an agreement of sale is within the Statute of Frauds? Explain.

8. Explain the consequence in the following case: B enters into a contract with A believing him to be C.

9. The subject matter of a contract has without the knowledge of either party ceased to exist at the time the contract is made, what is the consequence? What if it ceased to exist after the contract was made? Why?

10. When will forbearance to bring an action be a sufficient consideration for simple contract?

11. Explain the different ways in which common law and equity treated a misrepresentation anterior to the contract before the Judicature Act. What general rule in case of conflict is laid down by that Act?

12. Where goods procured by fraudulent representations are transferred to an innocent purchaser for value, how are his rights affected by the fraud?

Broom's Common Law.

1. What is the *lex non scripta* in English jurisprudence?

2. To what extent (if any) does customary law prevail in Ontario?

3. What is the general principle applicable to the rights of an individual over his own property consistently with the rights of other persons? Illustrate by examples.

4. Give example of damage too remote to sustain an action.

5. Distinguish a private from a public nuisance, and the rights of individuals to abate either.

6. What rule is there as to the precedence of criminal prosecutions over civil actions for the same offence? How, and when, and by whom can the precedence be insisted upon?

7. Into what three branches are torts divided? Give an example of each, and also an example of an action of contract and an action of tort growing out of the same transaction.

8. What is the difference in regard to legal liability between nonfeasance and misfeasance of gratuitous contracts?

9. When will the killing of a person by another be murder, manslaughter, and excusable homicide, respectively?

10. What is the distinction between larceny and embezzlement, and between larcency and robbery, respectively?

11. If goods remain in the possession of the vendor, subject to his lien for unpaid purchase money, and a wrong-doer takes them away, can the purchaser maintain an action therefor? Why?

12. Explain the main point of distinction between tort and crime.

Real Property.

1. What was the old law as to right of entry, upon the severence of the reversion on a lease for condition broken? Is there any statutory provision affecting the same, if so, what?

2. What are the provisions of R.S.O., ch. 108, in respect of tenancy by the curtesy?

3. Can a conveyance to a man be drawn so that dower will not attach? If not, can a conveyance be drawn so that the grantee can convey free of dower, if so, how?

4. "A," the mortgagee of estate Blackacre, obtains from B the mortgagor a release of the equity of redemption. What are his rights as against a subsequent mortgagee, C seeking to foreclose? Reasons.

5. It was held as law formerly that a mortgagee might pursue all his remedies at once. Has this principle been in any way trenched on by Provincial Legislation, if so, in what way?

6. What do you understand to be implied by the use of the word demise in conveyancing?

7. What are the provisions of the Vendors and Purchaser's Act as to registered memorials of deeds and registered memorials of discharged mortgages?

8. What effect, if any, has a bar of entail without the consent of the protector of the settlement?

9. Lands are granted to A, a bachelor, for his life, and after his decease, to his eldest son and the heirs of his body, and in default of such issue, to B and his heirs. Construe this. Supposing A surrenders his life estate to B, what effect would this have had? What legislation is there, if any, dealing with such a case?

10. What, if any, statutory provision is there as to words of limitation in deeds subsequent to 1st July, 1886?

11. Is it necessary for a receipt of the purchase money of real estate to be endorsed on the conveyance? Explain fully.

12. What statutory provisions are there in respect of improvements made under mistake of title?

Equity.

1. Distinguish between the care and diligence required of trustees (1) as regards their duty; (2) their discretions.

2. Under what circumstances will the Court set aside and cancel agreements and securities which are voidable merely.

3. What is the jurisdiction of the High Court of Justice in respect of alimony?

4. What, if any, statutory provision is there as to relief against forfeiture on breach of covenant to insure?

5. A and B who are near relatives, and who have long had a family dispute, enter into a compromise under which their difficulties are settled; B seeks afterwards to have the same set aside, alleging as a reason that he mistook a point of law, which had he not done so, would have materially affected his action in the compromise. Should he succeed? Explain general law in reference to compromises of this nature.

6. A makes a mortgage dated 5th January, 1887, to B and C jointly. B dies in January, 1888. In July of that year A wishes to pay off the mortgage which has become due. Can C grant a valid discharge of same? Reasons for your answer.

7. A writes B, his agent, instructing him to purchase for him a farm of a particular character for $5000; B happens to have a contract with C for the purchase of a farm which is of the character required by A. He procures C to make a conveyance to A of the farm. A shortly after becomes aware of this fact, and seeks to have the transaction avoided. Can he succeed? Explain.

8. Can a surety compel a creditor to proceed against the debtor after the debt has become due? If so, why? If not, why not?

9. A writes B a private letter. He learns that he is about to publish it. Has he any remedy, if so, what? Under what, if any, circumstances might such remedy be displaced?

10. A and B are residents of Toronto. B owns a farm in British Columbia, which he mortgages to A. The interests falls in arrears, and A brings an action for foreclosure in the High Court of Justice here. B enters an appearance and demurs to A's statement of claim on the ground that the farm is not within the jurisdiction. Who should succeed on the demurrer? and why?

11. Under what circumstances will the Cypres doctrine be applied in respect of legacies for charitable purposes?

12. Can a solicitor receive a gift from his client during the pending of the relationship between them? Explain fully.

Law Society of Upper Canada.

LAW SCHOOL—HILARY TERM, 1890.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

CURRICULUM OF THE LAW SCHOOL.

Principal, W. A. REEVE, Q.C.
Lecturers, E. D. ARMOUR. A. H. MARSH, LL.B.
Examiners, R. E. KINGSFORD, LL.B. P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto, are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1890, fourteen Scholarships in all will be offered for competition, seven for those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students.

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School:

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other ora methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.

Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.

Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.

Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.

Leith & Smith's Blackstone.

Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.

Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.
Leake on Contracts.

Real Property.
Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.
Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.
Lewin on Trusts.

Torts.
Pollock on Torts.
Pmith on Negligence, 2nd edition.

Evidence.
Best on Evidence.

Commercial Law.
Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.
Westlake's Private International Law.

Construction and Operation of Statutes.
Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.
British North America Act and cases thereunder.

Practice and Procedure.
Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.
Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively. On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

VOL. XXVI. JUNE 2, 1890. NO. 10.

IN the recent case of *Stephenson* v. *Dallas*, *ante* p. 253, the Chancellor has defined the scope of Rule 739, as to which some misapprehension exists. The Rule is only intended to apply where it is shown, from an acknowledgment by the defendant of the debt, or from other circumstances, that the defence is only for time, and the onus is thrown upon the defendant of shewing that he has a defence, where it is sworn on the part of the plaintiff that there is none. In the above case it was decided that when the facts are not clear and free from doubt, leave to sign judgment under the rule should not be granted; but where a distinct defence is not made out, terms should be imposed upon the defendant upon his being allowed to defend as a pledge of his *bona fides*, either by payment into court or otherwise securing a proportion of the amount claimed.

A BILL, indorsed by some of the most eminent members of the English Bar, has been introduced at the present session of the Imperial Parliament to regulate the procedure of the High Court. It is proposed to greatly reduce the operation of the Divisional Courts by enacting that motions for new trials and appeals from a judge sitting in court or chambers should be made to the Court of Appeal instead of the Divisional Court. We hope that a reform in a similar direction will be made in this Province, where numerous and expensive appeals, often on technical points, have disgusted suitors and diverted business from the courts. The Board of Trade has long ago provided means for settlement of disputes between its members by arbitration, and merchants prefer to resort to the same method of settlement rather than incur the risk of costly and prolonged litigation. The Divisional Court has not inaptly been called the fifth wheel of the legal coach, and there seems to be no good reason why it should not be abolished and its business transferred to the Court of Appeal. Its decisions are not decisive, nor are they in most cases accepted as final; while its varying constitution encourages defeated litigants to carry their cases to a higher court. The reform contemplated would necessitate a reduction in the expense of appeals to the Court of Appeal. The amount of money spent in the printing of pleadings, exhibits, and evidence in appeals to that court is a scandalous injustice to suitors, and benefits no one except the printers. There is no reason why appeals to the Court of Appeal should be more expensive than appeals as at present to the Divisional Court.

THE announcement that Mr. Justice Proudfoot has resigned his judicial office is not altogether unexpected. For some months past it has been obvious that the affliction of deafness from which he has been suffering has so seriously impeded his ability satisfactorily to discharge his duty as a judge, as to make his withdrawal from the bench a necessity. During the past winter he visited Europe, with the hope of obtaining relief, but, unhappily, in vain, and he has returned to Toronto to resign the office which he has filled for the past fifteen years. He was well read in civil law, but it cannot be said that he was a succees as a judge of facts.

And possibly his failure always to draw correct inferences from the facts proved before him, is due to his inability to attribute to others motives for their actions which would be utterly foreign to his own idea of truth and rectitude. Of him may be truly said as of "the man of Ross," that "E'en his vices leaned to virtue's side."

We do not think it can be said of the retiring judge that he will hereafter be remembered as one of our "great" judges. His judgments have been for the most part cold, dry expositions of law, somewhat lacking in that force and originality of expression to be found in the judicial utterances of the great lawyers of the past and of the present day. But we are sure that he will always be remembered by all his contemporaries as a patient, painstaking, conscientious judge, conspicuous for his courtesy to the bar, and one whose even temper it was almost impossible to ruffle.

While it is to be deplored that his grievous affliction should have necessitated his retirement while still in the full enjoyment of his mental powers, it is hoped that in the lecture-room and in the arena of literature he may yet have many years of usefulness before him.

PROVINCIAL LEGISLATION OF 1890.

The extra of the *Ontario Gazette* containing the public Acts passed at the recent session of the Legislative Assembly discloses the fact that at least four-fifths of them consist of mere amendments of existing statutes.

We have on former occasions deplored this passion for amendments with which our Provincial Legislature is affected. It is an expensive luxury, and one not by any means of unmixed benefit to the community.

The Government of the day can no doubt exercise considerable influence in controlling this species of legislation, and it is a pity they do not exercise it on some well-defined principles.

At present it would appear that so long as any proposed amendment is not *per se* positively objectionable, it is allowed to be passed almost as a matter of course; as though the constant tinkering of the statute law was of no moment, and had no detrimental effect.

When we look back on the early history of England, it is surprising to see with how little statute law our forefathers managed to get along. It was not

until the reign of George III. that the statute law began to develop to its present enormous proportions. This passion for constantly adding to the statute book is a modern craze, which is to some extent due to the anxiety of the members of the numerous British Legislatures to justify their existence, and to make their fellow-subjects believe they are getting some good of the large sums of money they cost the country.

It is almost useless to hope, and yet it does seem to be something greatly to be desired, that some restraint should be in some way placed upon the constant amendment and re-amendment of the statute law. There are one or two considerations, it appears to us, which should always control the question of amendment. We must start with this proposition, a change is *prima facie* objectionable and injurious. To warrant any change it should be made manifest (1) that the amendment is desirable *per se;* (2) that there is an urgent necessity for its immediate adoption. If not, then it might be reserved, either until further amendments of a more pressing character are proposed, or until the next general revision of the statutes.

We have before urged (unhappily without much effect) that when a statute requires to be amended it should be reprinted in full. If this plan were adopted, the law at any given date upon the subject dealt with by the statute could be more readily ascertained than at present. If the amendments proposed are so trifling and so insignificant that it is not worth incurring the comparatively small expense of reprinting the statute proposed to be amended, it would be better to defer the amendment until such other changes might be suggested by experience as to make it worth while incurring that expense. Under the present system, in order to arrive at the state of the statute law one has often to consult, not only the revised statutes, but every volume of statutes which has been subsequently issued. Whereas, if the plan we suggest were adopted, the law at the date required would always be found complete in one volume. When a statute is thus amended, the amendments might be indicated either by notes or by the use of a different type, so as to direct attention to the changes which are from time to time made. There would be the further advantage resulting from this method of legislation, that the work of statute revision would be immensely simplified; the statutes would be constantly revising themselves, as it were, and at the end of the decennial period the task of revision would be reduced simply to eliminating from the general mass of statutes those which had been repealed, and arranging those which remained in their proper sequence. But to proceed to the work of the past session.

The secrecy of the ballot at Provincial elections is further provided for by an Act (cap. 3) which imposes divers oaths on election officers; it is to be hoped that the remedy may prove effectual; but if secrecy is really desired, more effectual means could obviously have been devised to secure it. A secrecy which is only secured by official oaths may in some cases prove to be no secrecy at all.

One of the few original Acts passed during the recent session is the Act respecting Mining Regulations (cap. 10), which contains sundry useful regula-

tions regarding the employment of young people as miners, and the protection of those engaged in mining.

Power is given by chap. 13 for the reference to the High Court or Court of Appeal by the Lieutenant-Governor-in-Council "of any matter which he thinks fit to refer," and provides for the question being argued in presence of parties interested, or their counsel. By chap. 14 the Court of Chancery is declared to have had, and the High Court to have, power to sanction leases of settled estates containing agreements for renewal. Chap. 17 introduces sundry verbal amendments into the Surrogate Courts Act, so as to make it conform to the provisions of the Devolution of Estates Act, R.S.O., c. 108; amendments, by the way, which obviously ought to have been made when the statutes were revised. By sec. 21 of this Act an original provision is made, enabling a judge of an adjoining county to exercise jurisdiction where the applicant for probate or administration is himself judge of the court applied to. We are somewhat surprised to find that it has been found necessary to enact by chap. 18 that no judge or courts, except the High Court of Justice, courts of assize, *nisi prius*, *oyer and terminer*, and general gaol delivery, shall have power to try any treason, felony punishable with death, homicide, or libel. We were under the impression that such was already the law. This view seems to be borne out by the Act itself, for in the following section jurisdiction is expressly conferred on certain inferior courts of criminal jurisdiction to try certain cases of forgery. This Act, besides making one or two verbal amendments, also provides that the appointment and dismissal of constables is vested in the Justices of the Peace at the general sessions of the Peace, or any adjournment thereof, and not at any special ssssions.

By chap. 20 the pay of jurors is raised from $1.50 to $2 per diem; and by the same Act it is also provided that in case of a juror dying, or becoming incapacitated during a trial or assessment of damages, the presiding judge may direct the trial or assessment to proceed, and the verdict of the remaining eleven jurors is to be valid. This provision no doubt was suggested by the late St. George accident case, where a juror fell ill during the progress of the trial, and it, at one time, looked as if the immense expense of beginning *de novo* might possibly have to be incurred. It will be observed that the Act only provides for the case of the illness of one juror; if more than one should die or become incapacitated, the law remains as formerly. Any doubts as to the right of commissioners to take statutory declarations under the Devolution of Estates Act, or under any other Act, are intended to be removed by chap. 22.

By chap. 23, Justices of the Peace or other public officers sued for anything done in the exercise of their office by impecunious plaintiffs, are entitled to require security for costs to be given. By chap. 27 the Legislature has sought to some extent to overcome the effect of the decision of the learned Chancellor *In re Gilchrist & Island*, 11 Ont., 587, by providing that in cases to which that decision would apply, the assignee of the mortgagee may proceed to sell under the provisions of R.S.O., c. 102, part ii., and this provision is made retrospective. R.S.O., c. 102, part ii., we may observe, was amended by 51 Vict., c. 15, s. 3., and it may be a question whether the Act as it originally stood or as amended is

to apply to mortgages existing prior to the date of the amendment; if the amended Act, which is the only one now in existence, applies, the curious anomaly arises of an instrument being controlled by the provisions of a statute before the statute was enacted. Chap. 28 is an amendment of s. 68 of the Partition Act, which had been already amended by 51 Vict., c. 16. This second amendment of the same section within two years is a very good illustration of the justness of our preliminary observations. The amendment merely enables the inspector of legal officers to dispense with the advertisement required by s. 68 in certain cases.

Chap. 29 is an Act to protect persons assuming to act as personal representatives of persons who, on account of their absence for seven years, have been erroneously deemed to be dead. The first section is curiously worded, and manifests the want of care which characterizes so much of our Provincial legislation. The section commences with a reference to persons appointed administrators, but the concluding part of the section purports to protect executors also, who have not been previously mentioned. This ambiguity will no doubt necessitate a lawsuit to determine its meaning. While the persons acting as executors or administrators are protected from liability, except for the estate remaining in their hands undistributed, the persons other than creditors to whom the estate has been distributed remain liable to the owner, subject to the Statute of Limitations. The second section protects personal representatives for acts done by them under letters of administration granted under an erroneous supposition of intestacy, or under letters probate granted of invalid wills; but saves the right of the rightful owner to proceed against the persons to whom the estate has been distributed, subject to the Statute of Limitations. The Act does not protect persons acting fraudulently.

By chap. 30 sundry amendments are made to the Registry Act, none of which appear to be of any great importance. One of the amendments is to the effect that where a will is tendered for execution, with an affidavit of the personal representative that any land dealt with therein was subsequently conveyed away by the testator in his lifetime, and it so appears by the registry books, the will is not to be recorded against such property. This is a very superficial and insufficient attempt to deal with a very serious evil, viz., the registration of wills against property which is really not affected thereby, by reason of the will being invalid. By chap. 31 some insignificant amendment is made to the Custody of Title Deeds Act, enabling receipts for money to be deposited in the Registry office.

Some amendments to the Land Titles Act are made by chap. 32, but they appear to relate to matters of detail which it is not necessary here to discuss; save only, that in the case of possessory certificates the contribution to the guarantee fund is reduced by one-half.

By chap. 33 provision is made for vacating certificates of *lis pendens* for want of due prosecution of the *lis*. The court is also enabled to vacate a certificate of *lis pendens* upon payment of money claimed against the land into court. An order vacating the certificate, however, is not to be registered until the lapse of fourteen days from the date of the order, so as to give opportunity to appeal

from it. By chap. 35 an amendment is made to the Chattel Mortgage Act as regards mortgages made by companies to secure payment of their bonds; and the following chapter contains further amendments to the same statute. Why these amendments could not be embodied in the same statute is a mystery.

By chap. 37 an attempt has been made to simplify the procedure to enforce mechanics' liens. So little benefit has hitherto been derived from actions of this kind, that many judges and practitioners had arrived at the conclusion that for all the good it was to litigants the Mechanics' Lien Act might as well be repealed altogether. This new Act appears to be an heroic effort to give the principal Act some vitality. The scheme of procedure laid down by the Act is, shortly, this: Instead of issuing a writ, or taking any other preliminary proceeding, the plaintiff is to begin his action by filing a statement of claim, verified by affidavit, in the office of a Master, or Official Referee. This officer is then to issue a combined certificate and appointment, in duplicate, certifying that the claim has been filed, and appointing a time to adjudicate on it. One copy of this certificate is to be registered, and a copy of the other is to be served on all proper parties. No further pleadings are required to be filed, but in the appointment a day is first given for deciding (if the fact is disputed, which may be done by filing a notice) whether the plaintiff is entitled to a lien. That fact not being contested, or if contested, being decided, the officer is to proceed to take all necessary accounts of the amounts due by the owner, and to the plaintiff and other lien holders, and make a report. The owner is enabled to get rid of the suit, as far as he is concerned, by promptly paying the amount due by him into court, whereupon the lien may be summarily discharged. Or if nothing is found due by him, the action may be dismissed. Where the action is brought by a sub-contractor, the owner is to file a statement of the amount, if any, he admits to be due, and if more is established against him than he so admits, he may be ordered to pay the costs so occasioned. In default of payment by the owner, the Master or Referee is empowered to issue a judgment for sale of the land, on which the usual proceedings are to be taken. The total costs of the proceedings are not in any case to exceed twenty-five per cent. of the amount recovered for the satisfaction of the lien, and where there is more than one lien, we presume the twenty-five per cent. is to be governed by the amount realized for the lienholders collectively, though this is not very clear from the statute. The Master or Referee is also empowered to grant a certificate to the lienholders for the balance remaining due to them, which may be filed in the proper court, and thereupon may be enforced as a judgment of such court.

By chap. 38 a further amendment is made to the Mechanics' Lien Act by increasing the amount of the contract price to be retained under s. 7 according to a graduated scale, ranging from fifteen per cent. to ten per cent., according to the amount of the contract price.

By chap. 39 sundry amendments are made to the "Act to secure wives and children the benefit of Life Insurance" (R.S.O., c. 136). By chap. 74 the Act Respecting the Property of Religious Institutions (R.S.O., c. 237) is extended to Jews. None of the other statutes seem to call for any particular mention here.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for May comprise 24 Q.B.D., pp. 505-625; 15 P.D., pp. 49-65; and 43 Chy.D., pp. 469-637.

SOLICITOR AND CLIENT—ASSIGNMENT OF CHOSE IN ACTION—ASSIGNEE BECOMING SOLICITOR IN ACTION —GARNISHEE—ORDER—PRIORITY.

Davis v. *Freethy*, 24 Q.B.D., 519, was an interpleader action. Davis, who was a solicitor, purchased from one Marks a claim, for which he had recovered a verdict of £250 in an action of *Marks* v. *Raphael*. After the assignment, a new trial was granted, and Davis then became the solicitor in the action, which resulted in another verdict for the plaintiff for the same amount. Freethy was a creditor of Marks, and, after the second verdict, attached the debt in *Marks* v. *Raphael*, and he claimed that the assignment from Marks to Davis was void, under the authority of *Simpson* v. *Lamb*, 7 E. & B., 84, in which it was decided that a solicitor could not legally take an assignment from his client of the subject matter of a suit in which he was acting as solicitor. But the Court of Appeal, though approving of *Simpson* v. *Lamb*, distinguished it from the present case, and upheld the assignment because it was made before the relation of solicitor and client existed; and a contract so made is not affected by that relation being subsequently entered into.

LITHOGRAPHED SIGNATURES.

In *The Queen* v. *Cowper*, 24 Q.B.D., 533, the effect of a lithographed signature was discussed. Under the County Court Rules, in order to entitle a plaintiff to costs of a solicitor, the solicitor is required to sign the particulars. In the present case the signature of the solicitor was lithographed. Fry, J., agreeing with the Divisional Court, held this was not a sufficient compliance with the rules. Lord Esher, M.R., however, dissented.

PRACTICE—INSPECTION—AFFIDAVIT OF DOCUMENTS.

In *Wideman* v. *Walpole*, 24 Q.B.D., 537, the plaintiff had made an affidavit of documents which contained the usual clause, that he had not in his possession or power any documents save those produced by him. The defendant now applied on motion for the inspection of a document which he stated was in the plaintiff's possession, and he believed contained matters relative to the case, founding his affidavit on the fact that, in the course of an examination of the plaintiff, she had produced the document for the purpose of refreshing her memory as to a date. The plaintiff made no counter affidavit in answer to the application, but relied on her former affidavit of documents. She was ordered to permit the defendant to inspect, and the order was affirmed by Huddlestone, B., and Williams, J.

QUEEN'S PARDON—EFFECT OF.

In *Hay* v. *Justices of the Tower Division of London*, 24 Q.B.D., 561, a Divisional Court (Pollock, B., and Hawkins, J.) were called on to consider the effect

of a Queen's pardon for felony. By a statute it was enacted that every person convicted of felony should be forever disqualified from selling spirits by retail, and no license should be granted to a person who had been so convicted. The defendant applied for a license; he had been convicted of felony, but had received a free pardon under the Royal sign manual. Upon a case stated by the Board of Magistrates for the opinion of the court, it was held that the pardon removed the disqualification. In the words of Hawkins, J., the effect of the Queen's pardon is to absolve the person pardoned, not only from the actual punishment imposed, but from all other penal consequences.

NEGLIGENCE—MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT, 1880 (43 & 44 VICT., C. 42) S. 1, S-S. 3 (R.S.O., C. 141, S. 3, S-S. 4).

Snowden v. *Baynes*, 24 Q.B.D., 568, was an action for damages under the Employers' Liability Act (see R.S.O., c. 141, s. 3, s-s. 4). The plaintiff was employed by the defendant to work at a machine in a shed. A carpenter, also in the employment of the defendant, used to receive directions from the defendant or his foreman as to the work to be done, and give orders to the plaintiff and others as to what work each of them was to do, which orders they were bound to obey; but the carpenter had no control over the plaintiff in his work. One day while the plaintiff was working overtime at work which the carpenter had instructed him to do, the latter proceeded to stack timber in the shed, which was not safe for two persons to work in at the same time. By the negligence of the carpenter the timber fell, causing the injury to the plaintiff. Under these circumstances, Pollock, B., and Wills, J., held that the defendant was not liable, as the injury did not result from the plaintiff having conformed to any order given by the carpenter to do any particular work, and therefore s. 1, s-s. 3 of the Act did not apply.

BAILMENT—TITLE OF BAILOR—JUS TERTU—DISCOVERY—IRRELEVANCY.

In *Rogers* v. *Lambert*, 24 Q.B.D., 573, upon an interlocutory application, Denman and Wills, JJ., had to determine an important point of commercial law. The action was by bailors against their bailees for wrongful detention of a quantity of copper. The defendants claimed to examine the plaintiffs for discovery on the following point, viz., whether they had not sold the copper to Morrison & Co., and been paid the price by them; and whether they had not endorsed delivery orders in favour of Morrison & Co. Morrison & Co. were claiming the copper from the defendants, but the defendants admitted they were defending the action for their own interest alone, and not under the authority of Morrison & Co. The court held that the defendants were estopped from setting up a *jus tertu* under the circumstances, and that, therefore, the proposed questions were irrelevant and therefore inadmissible.

PRACTICE—ACTION AGAINST A FIRM—APPEARANCE—ORD. IX., RR. 6, 7; ORD. XII., RR. 13, 15, 16; ORD. XLII., R. 10 (ONT. RULES 265, 266, 288, 289, 876).

In *Davies* v. *Andre*, 24 Q.B.D., 598, the practice established by the judicature rules as to actions against firms received some elucidation at the hands of the

Court of Appeal. The action was brought against a firm of Andre & Co., and the writ was served on one Rath, who was alleged to be in charge of the business of the firm, and who, the plaintiff claimed, was a partner. Mr. Rath denied he was a partner, or in charge of the business, and he obtained leave to enter "a conditional appearance," unless the plaintiff would undertake not to seek to make him liable as a partner of the firm of Andre & Co. The Court of Appeal (Lord Esher, M.R., and Fry, L.J.) were of opinion that the rules warranted no such procedure. That the party served must either appear or not appear, he cannot half appear. It does not appear to us, however, that the Court of Appeal has quite satisfactorily removed what appears to us to be the dilemma in which Rath was placed. He was served with the writ; he was not named in it as a member of the firm. But the plaintiff claimed he was a member of the firm. The service on him was therefore somewhat equivocal, and it was difficult for him to know whether he was served as being an alleged partner, or merely as a person in control of the business. He might be in control of the business without being a partner. And yet upon a judgment against a firm, the rules allow execution to issue against persons who have been served as partners and have failed to appear. Rath might be met, if he did appear, with the statement that he was not served as a partner, and therefore had no right to appear; but if he did not appear, then the plaintiff might turn round and say he had been served with the writ as a partner, and had not appeared, and was therefore liable to execution. It appears to us that the rules place a man served under such circumstances in a somewhat awkward position. How is a person to know whether or not he is "served as a partner" in a case where his name does not appear on the writ? Perhaps the proper explanation of the rules is, that a man cannot be said to be "served as a partner" unless he is on the face of the writ named as a partner.

ATTACHMENT FOR CONTEMPT OF COURT—CRIMINAL MATTER.

The only case in the Probate Division to which it seems necessary to direct attention is *O'Shea* v. *O'Shea*, 15 P.D., 59, in which the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) determined that where, in a civil proceeding, an application is made against a person, not a party to the action, for contempt of court in publishing comments calculated to prejudice the fair trial of the action, it is "a criminal cause or matter," and therefore no appeal from the order made upon such an application will lie to the Court of Appeal; in which respect it differs from an attachment to enforce obedience to an order made in a civil action or proceeding, which is appealable.

LIGHT AND AIR—RAILWAY COMPANY—SALE OF SURPLUS LAND WITH HOUSE THEREON—IMPLIED COVENANT WITH PURCHASER.

Myers v. *Catterson*, 43 Chy.D., 470, though perhaps not strictly an authority in Ontario, is, nevertheless, an instructive case as to the implied obligation which a vendor assumes not to do or permit anything to be done on land he retains which will interfere with the enjoyment by the purchaser of the property he

purchases. The facts in this case were, that a railway company sold a piece of the land not required for their railway to the plaintiff, together with a house which they had allowed him to erect thereon. The house was close to their line of railway, which ran over a series of arches, through two of which there was some access of light to two of the lower windows of the plaintiff's house. The company retained in their own hands lands on the other side of the railway, opposite the plaintiff's house; and their conveyance to him contained a recital that all the land acquired by them, except that sold to the plaintiff, would be required by them for their railway, and it contained no express grant of right, or covenant as to light. The defendant's predecessor in title afterwards acquired from the company, under a conveyance, subject to any right of light which the plaintiff might have, the fee of the lands opposite the plaintiff's house, and erected buildings thereon, and he also took a lease of the arches. The defendant subsequently acquired this property, and blocked up the arches nearest the plaintiff's house with hoardings. The plaintiff claimed a mandatory injunction to compel the defendant to remove the hoarding; and it was held by the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.), affirming Kekewich, J., that when the company sold the land to the plaintiff they had entered into an implied obligation not to do or permit anything on the land which they retained which would interfere with the plaintiff's reasonable enjoyment of the land he purchased, except what was required for the construction of the railway, and that the hoarding not being for that purpose, the plaintiff was entitled to the relief claimed. The effect of this implied obligation, however, might possibly be held in Ontario to be modified by the R.S.O., c. 111, s. 36, which prevents any person now acquiring an easement of light over the land of another; at the same time it is not clear that it would do so, because it will be observed that the plaintiff's right in this case arose, as we have seen, not by prescription, but from an implied covenant or obligation on the part of his vendors, which might be held to arise notwithstanding the statute.

WILL—CONSTRUCTION—GIFT TO A CLASS.

In re Musther: Groves v. *Musther*, 43 Chy.D., 569, a testatrix by her will gave the residue of her property to be equally divided between her nephews and nieces, sons and daughters of her late brothers George, John, William and Christopher, "but should any of them be dead before me, I then direct that his or her share shall be equally divided between his or her children." Kay, J., held, following *Christopherson* v. *Naylor*, 1 Mer., 320, that the children living at the death of the testatrix, of nephews or nieces who were dead at the date of the will, did not take. This decision was affirmed by the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), notwithstanding some contrary decisions of Sir George Jessel, M.R. It does not appear to have been argued that the fact that a will now speaks from the death of the testatrix has affected the question of construction of such a bequest, and yet we should have thought the point was worthy of discussion.

Correspondence.

DOMINION LEGISLATION OF LAST SESSION.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Allow me to congratulate the JOURNAL, its readers, and the country, on the close of what His Excellency calls a somewhat protracted session, and on his being able to thank our representatives for the diligence with which they have applied themselves to their important duties, and on his general approval of the 109 Acts they have passed. The speech and the list of Acts you have already in the official *Gazette*, and I hope in a day or two to send you the list with the Acts chaptered as they will be in the Statutes, and I trust you and your readers will find no reason to dissent from His Excellency's opinion of their value. The value of his opinions is a subject which does not interest the public. The Bank Act would, in the opinion of many, have been improved by the omission of the provision making the several institutions *quasi* indorsers of each other's notes, in order that all may pass currently in every part of the Dominion; to these dissenters it seems that it would have been better to make every bank have its agent for redeeming its notes in every Province, and letting its notes be current or not according to the standing of the bank in the estimation of the public. Everyone is pleased that the Government abandoned the idea of confiscating unclaimed dividends, and has adopted the English plan of giving public information respecting them. The amendments to the Criminal Law are undoubtedly improvements; perhaps it would have been well if they had included some provisions for the prevention and punishment of *boodling*, but Mr. Blake's promised Bill for better securing the independence of Parliament, with which that interesting offence has been shown to be closely connected, will deal with it; but of this hereinafter. Of the martyred innocents it is unnecessary to speak, their merits and the loss the country sustains by their slaughter are recorded in our Canadian Hansard, in the eloquent words of their respective parents, and if they deserved a better fate they will attain it in a future session, and emerge from the chrysalis state of Bills into the perfect state of Acts. I regret the fate of one little one for the legalization of standard time, which we have been using throughout the Dominion for years with great convenience, but illegally opening and closing polls, offices, banks, and sittings of legislatures, at Quebec, Montreal, Toronto, and all places in the Provinces of Quebec and Ontario by *l'Original time*, varying in many places from half an hour to nearly an hour from the solar time required by law. This Bill was brought into the Senate by Mr. MacInnes, on the suggestion of Mr. Fleming, who had distinguished himself at the Washington conference in 1884, for establishing a prime meridian for the reckoning of longitude, and of time as depending on it, and which agreed upon that of the observatory at Greenwich. But Mr. MacInnes moved too late in the session, and we are to go on illegally for another year before we follow the example set us by the Imperial

Parliament in 1880, by the Act 43 Vict., c. 9, doing for England and Ireland what Mr. MacInnes wants us to do for Canada. It seems, then, that something may be done by Congress for the United States, which has hitherto been prevented by a supposed difficulty as to State and Congress jurisdiction. If Congress takes the matter up we may perhaps follow; I would rather we had led.

Our session was stormy as well as long, the "Outs" accusing the "Ins" of all sorts of wickedness, legislative and otherwise, and the "Ins" retorting, as of old, "*tu quoque*"; each calling the other very ugly names, and receiving the same answer, "you're another," supposed to be a quite sufficient and unanswerable reply. But we had, as you know, two first-class scandals, of which General Middleton and Mr. Rykert were the central figures. In the General's case everyone grieves that a man so much respected and liked, and to whom our country is indebted, and has acknowledged its indebtedness, for most excellent service in the North-West, did not, when convinced of his mistake in declaring certain furs *confiscated*, and acting as if he were the *Fisc* and had a right to divide them between himself and his friends, say at once, as we are told and are willing to believe he has since done, that he was ready to pay the sum which the committee had reported as the value of the furs, and recommended that Bremner should be paid for them. In spite of Mr. Blake's clear exposition of the rules of the British service, I cannot believe that the General knowingly intended to do wrong. Mr. Rykert's case admits of no excuse. Elected as a member of that branch of Parliament especially entrusted with the care of the property and pecuniary interests of the people, and paid for his services as such, he, by means which a select committee of his fellow-members has formally declared to be "discreditable, corrupt and scandalous," and by misusing the faith which from his position members of the Ministry and public officers under them placed in him, is reported to have obtained from the Government for $500 a grant of timber limits which is said to have produced $200,000 to him, or the party for whom he obtained them, and from whom he says he received $3,000 for thirty days, during which he was using the means aforesaid for procuring them. Mr. Rykert, having resigned as a member of the Commons, is appealing to his former constituents for re-election; but would the House, after declaring his conduct to be discreditable, corrupt and scandalous, allow him to sit as one of its members, remembering the old adage as to similarity of plumage? Mr. Macdougall defended him very cleverly, but the defence was only a demurrer to the jurisdiction of the House, not a plea to the merits or an assertion of the morality of his client's conduct. And if the Attorney-General (Sir John Thompson) had, as some assert, previously prepared or agreed to a report favourable to Mr. Rykert, it must have been of the same nature as Mr. Macdougall's defence, and not an approval of what Mr. R. did. As to the question whether an offender can lawfully retain effects obtained by his offence, and whether the law affords means of compelling him to give them up, the answer on moral grounds is pretty clearly given in one of your late numbers, by Hamlet's uncle, that he cannot lawfully retain them; and the said uncle says further:—

> "In the corrupted currents of this world,
> Offence's gilded hand may thrive by justice;
> And oft 'tis seen the wicked prize itself
> Buys out the law. But 'tis not so above—
> There is no shuffling there."

In the case before us is there no way of obtaining the recission of the grant by which $200,000 worth of property are said to have been obtained for $500? Is there no mistake as to the property, no concealment of knowledge of its value by the grantee, no *fraud* which vitiates everything? The Roman law held taxation to the extent of half the value to be sufficient, and though our modern law, founded more on trading principles, does not go so far, I think it still says that very gross inadequacy may afford evidence of the existence of fraud. Is $200,000 obtained in the manner reported by the committee for $500 sufficiently gross inadequacy? If English law affords no remedy in such a case, or it exists and our lawyers cannot find it, so much the worse for the law and lawyers, and Mr. Blake's purifying Bill is the more urgently necessary. I think if a like case had been referred by Hamlet's father to his Lord Chancellor, or whoever might there be the proper authority, and he had reported no remedy, King Hamlet would have thought and said there was "something rotten in the State of Denmark," which must and should be cured. W.

Notes on Exchanges and Legal Scrap Book.

A valued correspondent has called our attention to an error in the last paragraph of the article on the "English Ceremonial on Taking Silk." It should read: "The Oaths Commissioners recommended that in altering the form of this oath the words '*unless* with license of Her Majesty' should be inserted where marked *."

EMPLOYERS' LIABILITY.—The state of judicial opinion on the question when a workman precludes himself from recovering against his employer under the Employers' Liability Act is becoming as embarrassing as that upon the Bills of Sale Acts. It will be remembered that the famous decision in *Thomas* v. *Quartermaine*, which, unfortunately, did not go to the House of Lords, left the law in this position, as put by Lord Justice Bowen: "It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not *scienti non fit injuria*, but *volenti*." Then, after referring to certain conditions, the Lord Justice concludes: "Knowledge is not a conclusive defence in itself, but when it is a knowledge under circumstances that leave no inference but one, viz., that the risk has been voluntarily encountered, the defence seems to me complete." That was the view adopted by Lord Esher and Lord Justice Fry, the other members of the Court. The decision has been very much can-

vassed and adversely criticised both in the High Court and the County Court, but never before has it met with judical comment so strong as that which fell from Lord Coleridge and Mr. Justice Mathew in the case of *Sanders* v. *Barker* last week. It is worth while looking at what were the facts in that case: The defendants, the employers, are brewers in the City, and had a hand-pump in their brewery used to force the liquor into pipes by means of steam-power. It was against the wall, and the fly-wheel was quite close to the wall, and it was worked by a turning wheel which let the steam into the pump. When the steam went in it ought to have worked by itself, but it required a touch or two to set it going, and these touches the workman gave with his finger. The plaintiff was the man employed at this work, and from time to time put his finger to the wheel for the purpose. On the occasion in question he had thus put his finger to it, when it was caught and injured so that he lost it. He admitted in cross-examination that he "knew there was a risk," that is, by reason, as he said of a defect in the machinery in not working without being thus touched by the finger, which defect he had asked to be repaired. The jury found (in the City Court) that there was a defect in the machinery by reason of neglect on the part of the employers, but that the plaintiff knew of the defect and worked voluntarily with that knowledge: though he had not, he said, full knowledge of the risk he was incurring, but only "that an accident might happen," and that he had given notice of the defect to the defendants, who knew of its existence. The Judge, (Mr. Kerr) directed the verdict to be entered for the defendants, giving leave, however, to the plaintiff to move to enter the verdict for him for damages, which the jury assessed at £20. It is difficult to see in what particular this case differs in point of fact from *Thomas* v. *Quartermaine*. The plaintiff there fell into the cooling-vat of a brewery. The County Court Judge held that there was evidence of a defect in the brewery, because there was no sufficient fence to the vat, but that the condition of the vat was known to both plaintiff and defendant; and he found that the plaintiff had not been guilty of contributory negligence. The Divisional Court, consisting of Justices Wills and Grantham, set aside the judgment in favour of the plaintiff, and directed judgment for the defendant. This was affirmed in the Court of Appeal, and thus the plaintiff was deprived of all remedy for the injury resulting from the negligence of the defendant which was found by the County Court Judge. Now, in *Sanders* v. *Barker* the judges said that they should shrink from a definition of "voluntarily" which would in many cases deprive the workman of any remedy. In dealing with *Thomas* v. *Quartermaine*, Lord Coleridge first said that the decision was no doubt right on the ground that there was no evidence of neglect in the employer. This is incorrect: There was not only evidence, but the finding of the County Court judge. His Lordship also asked whether there was any case in which, the workman having pointed out the danger and asked that it be remedied, the employers had been held not liable. To which the correct answer was made, that the point was covered by the judgment in *Thomas'* case. Whereupon Mr. Justice Mathew said: "No doubt the judgment was an effort to establish that proposition, and a judgment which is an astonishing instance of the capacity of the human intellect, though

it had not convinced him." We are surprised to see that Lord Coleridge repeated that he did not think *Sander's* case covered by *Thomas'* case, as, in our judgment, it most certainly is. The pressure of *Thomas'* case seems to have been felt by the Court of Appeal in the case of *Yarmouth* v. *France*, a case in which Lord Justice Lopes dissented from Lord Esher and Lord Justice Lindley. It was then what is called "distinguished," although the plaintiff was a workman injured by a vicious horse of his master, which horse he knew to be vicious. Lord Esher then took occasion to say that his position with regard to *Thomas'* case was an extremely delicate one, as he had dissented from the rest of the court, and thought the decision utterly wrong, and he said, "Does the judgment of Lord Justice Bowen mean to say that the mere knowledge of the workman and his continuing in the employ is fatal to him?" and he intimated his view that that would be wrong. Lord Justice Lindley did not consider that *Thomas'* case went so far as to protect masters who knowingly provide defective plant for their workmen, and who seek to throw the risk of using it on them by putting them in the unpleasant position of having to leave their situations or submit to use what is known to be unfit for use. This, however, is not the general opinion of County Court judges and the profession. After what has fallen from the court in *Sanders'* case, and having regard to the weight of Lord Esher's authority and the view of Lord Justice Lindley, we would suggest that *Thomas* v. *Quartermaine* should be considered as no authority for the larger proposition, and should not be allowed to stand in the way of a workman injured by defective machinery known to be defective both to himself and to his master.—*Law Times.*

THE RULE OF THE ROAD.—It is a general, but not always a binding, rule that one vehicle in passing another in a highway should take the left side of the driver. This is called in the reports the law or rule of the road, and was, acording to Lord Kenyon, "introduced for general convenience." Where carriages are driving on a narrow road, or where accidents might happen, the rule ought to be adhered to; and in driving at night the rule ought to be strictly adhered to, and never departed from, as it is "the only mode by which accidents can be avoided." But where, Lord Kenyon continued, the road was sufficiently broad for all persons and carriages to pass, though a carriage might be driving on the wrong side of the road, if there was sufficient room for other carriages and horses to pass on the other side, a person was not justified in crossing out of the way in order to assert what he termed the right of the road. It was putting himself in the way of danger, and the injury was of his own seeking. In a note by Mr. Epinasse to the report of the case, *Cruden* v. *Fentham*, 2 Esp., 684, from which these observations are taken (the case does not appear to have been reported elsewhere), we find that on a motion for a new trial Lord Kenyon expressed himself in nearly the same terms. The mere fact, however, of the defendant being on the wrong side of the road does not constitute sufficient evidence of negligence to render him liable, nor the mere fact of the plaintiff being on his wrong side afford any justification for the defendant to

run against him if there was sufficient room for the defendant to pass without any inconvenience. Thus, as in *Clay* v. *Wood*, 5 Esp., 44, the plaintiff's servant was riding on the wrong side of the road, but near the middle of it. The defendant was the owner of a chaise, then driven by his servant. On coming out of another road, the defendant's servant crossed the road over to that side of the road in which the plaintiff's servant was riding. This was the defendant's proper side. There was ample room to pass the plaintiff, even although he was on his wrong side. In crossing the road, which the defendant's servant did negligently, the shaft of the chase struck the plaintiff's horse and injured it. Notwithstanding the fact that the plaintiff was on his wrong side, the defendant was held liable. The question Lord Ellenborough left to the jury was, whether there was such room that though the plaintiff's servant was on the defendant's wrong side of the road, there was sufficient room for the defendant's carriage to pass between the plaintiff's horse and the other side of the road. Rook, J., took the rule of law to be that "if a carriage, coming in any direction, left sufficient room for any other carriage, horse, or passenger coming on its side of the way, that it was sufficient; but it was a matter of evidence if the defendant had done so. The driver was not to make experiments, he should leave ample room, and if an accident happened for want of that sufficient room he was, no doubt, liable," *Wordsworth* v. *Willan*, 5 Esp., 273. This has been followed in the recent case of *Finegan* v. *London and North-Western Railway Company*, *ante* p. 663. Should, however, persons, one of whom is on the wrong side, meet on the sudden or in a dark night, and an injury result, the party on the wrong side will be held answerable, unless it clearly appears that the party on the right side had ample means and opportunity to prevent it. It follows that if a person drives his carriage on the wrong side he must use more care, and keep a better look-out to avoid collisions or accidents than would be necessary if he were using the proper side of the road. In other words, where there are two courses, one of which is perilous and the other safe, the driver is bound to adopt that which is safe. When there is no carriage on the road the driver may keep in the middle of the road, and is not bound to keep on the left-hand side, even though the accident might have proceeded from the carriage not being on its proper side. If he sees a horse or carriage coming furiously along on its wrong side, while he is on his right side, it is his duty to give way and avoid an accident, although, in doing so, he goes a little on what would otherwise be his wrong side. A similar rule applies to saddle-horses, and also, it is presumed, to bicycles, as applies to carriages, but the rule does not apply tot he case of a foot-passenger, although he has a right to walk along the carriage-way. Accordingly, the mere fact of a man's driving on the wrong side of the road is no evidence of negligence in an action brought against him for running over a foot-passenger who was crossing the road. Drivers of carriages, however, must take care to avoid driving against a foot-passenger who is crossing the road, and, on the other hand, foot-passengers in crossing the road, are bound to take due caution in avoiding vehicles. It follows, therefore, that, in order to sustain an action for injury sustained by the negligent driving of the

defendant, the injury must have been caused by the negligence of the defendant only, without the negligence of the plaintiff contributing in any way to the accident. "It is the duty of a person," said Pollock, C.B., in *Williams* v. *Richards*, 3 C. & K., 81, "who is driving over a crossing for foot-passengers at the entrance of a street to drive slowly, cautiously, and carefully; but it is also the duty of a foot-passenger to use due care and caution in going upon such crossing, so as not to get among the carriages and thus receive injury." In an action for injuries sustained through being run over by a vehicle, driven by a servant of the defendant, evidence that he might have seen the plaintiff in time to pull up, if he had not been looking at his horses, owing to the want of a "skid" in going down hill, was held sufficient evidence on the defendant's part; and also that even although there was some negligence on the plaintiff's part in crossing the road, yet the defendant was liable if his servant, by the exercise of reasonable care, could have seen the deceased, and avoided the accident, *Springett* v. *Ball*, 4 F. & F., 472. In cases of this sort, to warrant the judge in leaving the case to the jury, proof of well-defined negligence, and not merely some evidence of negligence on the part of the defendant, must be adduced. Where the evidence given is equally consistent with there having been no negligence on the part of the defendant as with there having been negligence, it is not competent for the judge to leave it to the jury to find either alternative; such evidence must be taken as amounting to no proof of negligence. Thus in *Cotton* v. *Wood*, 29 L.J.C.P., 333, the deceased endeavoured to cross the road, and had crossed the line of direction in which the defendant's omnibus was proceeding, when, alarmed at the approach of some other vehicle, she turned back and endeavoured to regain the pavement on the side from which she had started, and, in so doing, was knocked down by the defendant's horses and killed. The night was dark, and it was snowing fast, but the streets were well lit by gas lamps. The omnibus was proceeding at an ordinary pace and was on its proper side. The driver saw the woman cross the road clear of his omnibus, but at the moment she attempted to re-cross he had turned his head to speak to the conductor, and was not aware of the deceased's danger until too late. Upon the facts a non-suit was entered. Such are the principles on which the courts have acted in cases where injuries have been sustained in consequence of the infringement of the rule, and on which actions are maintainable at common law.

[In Ontario, by R.S.O., c. 195, ss. 1, 2 and 3, persons travelling or being upon a highway in charge of a vehicle, on meeting another vehicle, shall turn out to the right from the centre of the road, allowing to the vehicle or horseman so met one-half of the road; or if vehicle or horseman be overtaken by another travelling at a greater speed, the person so overtaken shall quietly turn to the right and allow said vehicle or horseman to pass, and if the driver is unable to turn out to the right he shall immediately stop, and if necessary for the safety of the other vehicle, and if required so to do, shall assist the person in charge thereof to pass without damage.—ED. C.L.J.]

DIARY FOR JUNE.

1. Sun....*Trinity Sunday.*
4. Wed...Lord Eldon born 1751.
5. Thu....Battle of Stoney Creek, 1813.
7. Sat.....Easter Term ends.
8. Sun....*First Sunday after Trinity.*
9. Mon...County Court Sittings for Motions in York. Surrogate Court Sittings.
10. Tues...General Sessions and County Court Sittings for trial except in York.
11. Wed...St. Barnabas. Lord Stanley Gov.-Gen., 1888.
14. Sat.....County Court Sittings for Motions in York end. Magna Charta signed, 1215.
15. Sun....*Second Sunday after Trinity.*
16. Mon...Battle of Quatre Bras, 1815.
18. Wed...Battle of Waterloo, 1815.
19. Thu....Battle of Blenhiem, 1704.
20. Fri.....Accession of Queen Victoria, 1837.
21. Sat. ...Longest day.
22. Sun....*Third Sunday after Trinity.* Slavery declared contrary to the laws of England, 1772.
24. Tues...Midsummer Day. St. John Baptist.
25. Wed...Sir M. C. Cameron died 1887.
28. Sat.....Coronation of Queen Victoria, 1838.
29. Sun....*Fourth Sunday after Trinity.* St. Peter.
30. Mon...Jesuits expelled from France, 1880.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

[June 14, 1888.

PARTLO *v.* TODD.

Trade Mark—Registration—Effect of—Exclusive right—Property in words designating quality—Rectification of registry.

P., a manufacturer of flour, registered a trade mark, under the Trade Mark and Design Act, 1879 (42 Vict. c. 22), consisting of a circle containing the words, "Gold Leaf," surmounted by the number 196, and with the word "flour" and P.'s name underneath, the whole surrounded by the words "Ingersoll Roller Mills, Ont., Can."

In an action against T. for using a similar mark, and selling flour purporting to be the "Gold Leaf" of P., the defendant was allowed to offer evidence to show that "Gold Leaf" was a description applied to flour made by a particular process, and was in common use by the trade, both in Ontario and the Maritime Provinces, prior to the registration of such trade mark.

Section 8 of the Act provided that after registry the person registering a trade mark "shall have the exclusive right to use the same to designate articles manufactured by him," and the said evidence was objected to on the ground that under this section the validity of the trade mark could not be impugned.

Held (affirming the decisions of the Divisional Court, 12 O.R.C., 171, and of the Court of Appeal, 14 O.R.C., 444, TASCHEREAU, J., dissenting), that the evidence was properly admitted; that a trade mark is not made such by registration, but it is only a mark or symbol in which property can be acquired, and which will designate the article on which it is placed as the manufacture of the person claiming an exclusive right to its use, that can properly be registered; and that the statute does not prevent a person accused of infringing a trade mark from showing that it is composed of words or symbols in common use, to which no exclusive right of user can attach.

Held, also, that where the statute prescribes no means, by way of departmental procedure or otherwise, for rectification in case of a trade mark so improperly registered, the Courts may afford relief, by way of defence, to an action for infringement.

Held, per GWYNNE, J., that property cannot be acquired in marks, etc., known to a particular trade as designating quality merely, and not, in themselves, indicating that the goods to which they are affixed, are the manufacture or stock-in-trade of a particular person. Nor can property be acquired in an ordinary English word, expressive of quality merely, though it might be in a foreign word, or word of a dead language.

Appeal dismissed with costs.

W. Cassels, Q.C., for the appellant.

Moss, Q.C., and *McCarthy*, Q.C., for the respondent.

[June 14, 1889.

BROWN *v.* LAMONTAGUE.

Chattel mortgage—Fraud against creditors—Prior agreement—Additional chattels in mortgage—Effect of.

B. sold a quantity of machinery, tools and fixtures to one P. for $3120.90. The goods were in a factory owned by B., and were to be paid for by monthly payments, extending over a period of forty-eight months. P. agreed to keep them insured in favor of B., and to give B. a hire receipt or chattel mortgage, as security for payment. P. was put in possession of the property, and received letters from B. recomending him to certain merchants in Montreal, and he went to Montreal and purchased goods from L. among others.

Two months after L. sued P. for the price of goods so purchased, amounting to about $1000, and after being served with the writ in such suit, P. gave B. a chattel mortgage on the goods originally purchased and other goods which it was alleged would have been included in the purchase from B., had it not been claimed that they were not in the factory at the time, but were afterwards found to be there. P. had not given a hire receipt or chattel mortgage at the time of the original purchase from B.

L. having signed judgment against P., issued executions, and caused the mortgaged goods to be seized thereunder. On the trial of an interpleader issue to try the title in said goods judgment was given in favor of B. for the goods originally sold to P., but not for those added in the mortgage. The Divisional Court held, on motion to set aside this judgment, that the mortgage was void for the inclusion of the goods not mentioned in the original agreement and reversed the judgment at the trial in B.'s favor. This decision was affirmed by the Court of Appeal. On appeal to the Supreme Court of Canada,

Held, that the judgment of the Court of Appeal was right, and should be affirmed.

Appeal dismissed with costs.

O'Gara, Q.C., for the appellant.

Belcourt for the respondent.

PONTIAC *v.* ROSS.

Municipal aid to Railway Company—Debentures—Signed by Warden de facto—44 and *45 Vict., c. 2, s. 19, P.Q.—Completion of line—Evidence of—Onus probandi on defendant.*

A municipal corporation under the authority of a by-law, issued and handed to the treasurer of the province of Quebec, $50,000 of his debentures as a subsidy to a railway company, the same to be paid over to the company in the manner and subject to the same conditions on which the government provincial subsidy was payable under 44 and 45 Vict. c. 2, s. 19, viz.: "When the road was completed and in good running order to the satisfaction of the Lieutenant-Governor-in-Council."

The debentures were signed by S.M., who was elected warden, and took and held possession of the office after W. J. P. had verbally resigned the position.

In an action brought by the railway company to recover from the treasurer of the Province the $50,000 debentures, after the government bonus had been paid, and in which action the municipal corporation was *mise en cause* as a co-defendant, the Provincial treasurer pleaded by demurrer only, which was overruled, and the County of Pontiac pleaded general denial, and that the debentures were illegally signed,

Held (affirming the judgment of the Court below), 1st. that the debentures signed by the warden *de facto* were perfectly legal.

2nd. That as the provincial treasurer had admitted by his pleadings that the road had been completed to the satisfaction of the Lieut.-Governor-in-Council, the onus was on the municipal corporation, *mise en cause*, to prove that the government had not acted in conformity with the statute. STRONG, J., dissenting.

Appeal dismissed with costs.

Langelier, Q.C., and *McDougall* for appellant.

Irvine, Q.C., and *D. Ross* for respondent.

HARDY *v.* FILIATRAULT.

Demolition of dam—Transaction—Arts. 1918, 1920, C.C.—Report of expert—Motion to hear further evidence.

In an action brought by a riparian owner, asking for damages and the demolition of a second dam built by another riparian owner, in contravention to the terms and conditions of an agreement made between the parties, while a judgment ordering the demolition of the first dam was pending in appeal, the Superior Court appointed a civil engineer as expert, who reported that the second dam did not injnre the plaintiff's property.

The Superior Court subsequently rejected a motion made by the plaintiff, asking to examine the said expert to explain his report, and dismissed the action with costs. This judgment was confirmed by the Court of Queen's Bench for Lower Canada (Appeal side) and on appeal to the Supreme Court of Canada it was—

Held, per FOURNIER, GWYNNE and PATTERSON, JJ., that the provisions of arts. 1918 and 1920,

C.C., under the title of Transactions, were applicable to the agreement made in respect to the first dam, and that there was sufficient evidence in the case to dispose of the action by a judgment for the plaintiff. RITCHIE, C.J., and TASCHEREAU, J., dissenting.

Patterson, J., being of opinion that as the principal ground of appeal was to have the case sent back to the Court of first instance for further evidence, he would agree with the dissenting judges not to do more for the plaintiff.

Appeal allowed with costs.

Laflamme, Q.C., for appellant.

Geoffrion, Q.C., and *Beaudin* for respondent.

PIGEON *v.* RECORDER'S COURT.

Prohibition—By-law respecting sale of meat in private stalls—Validity of—37 Vict. c. 51, s. 123, sub-sec. 27 and 31 P.Q.—Intra vires of Provincial Legislature.

The Council of the City of Montreal is authorised by sub-sections 27 and 31 of s. 123 of 37 Vict. c. 51, to regulate and license the sale in any private stall or shop in the city, outside of the public meat markets, of any meat, fish, vegetables, or provisions usually sold on markets.

Held, affirming the judgments of the Court below, that the subsections in question are intra vires of the Provincial Legislature, and that a by-law passed by the City Council under the authority of the above-named sub-sections, fixing the license to sell in a private stall at $200, is valid.

Appeal dismissed with costs.

Geoffrion, Q.C., and *Madore* for appellant.

Ethier for respondent.

DAVIS v. KERR.

Tutor and minor—Loan to minor—Arts. 297 298, C.C.—Obligation void—Personal remedy for monies used for benefit of minor—Hypothecary action.

Where a loan is improperly obtained by a tutor for his own purposes, and the lender, through his agent, has knowledge that the judicial authorisation to borrow has been obtained without the tutor having first submitted a summary account, as required by art. 298, C.C., and that such authorisation is otherwise irregular on its face, the obligation given by the tutor is null and void.

The ratification by the minor, after becoming of age, of such obligation, is not binding if made without knowledge of the causes of nullity, or illegality of the obligation given by the tutor.

If a mortgage granted by a tutor, and subsequently ratified by a minor when of age, is declared null and void, an hypothecary action brought by the lender against a subsequent purchaser of the property mortgaged will not lie.

A person lending money to a tutor, which he proves to have been used to the advantage and benefit of the minor, has a personal remedy against the minor, when of age, for the amount so loaned and used.

Appeal allowed with costs.

Laflamme, Q.C., for appellant.

Hutchinson for respondent.

[Oct. 9, 1888.

WYMAN *v.* IMPERIAL INSURANCE CO.

Fire insurance—Insurable interest—Mortgagee—Assignment of policy.

In 1877, T. held a policy of insurance on his property, which he mortgaged to W. in 1881, and an endorsement on the policy, which had been annually renewed, made the loss payable to W. In 1882 T. conveyed to W. his equity of redemption in the property, and a few months after, at the request of W. an endorsement was made on the policy, permitting the the premises to remain vacant. The policy was renewed each year until 1885, when all the policies of the insurance company were called in, and replaced by new policies, that held by W. being replaced by another in the name of T. to which W. objected, and returned it to the agent, who retained it. The premiums were paid by W. up to the end of 1886.

The insured premises were burned, and a special agent of the company, having power to settle or compromise the loss, gave to W. a new policy in the name of T., having the vacancy permit, and an assignment from T. to W. endorsed thereon, and containing a condition not in the old policy, namely, that all endorsements or transfers were to be authorised by the office at St. John, N.B., and signed by the general agent there. The company having refused payment,

an action was brought on the new policy against them, and the agent who first issued the policy to T. was joined as a defendant, relief being asked against him for breach of duty and false representations. The Supreme Court of Nova Scotia set aside a verdict for the plaintiff in such action, and ordered a new trial on the ground that his interest was not insured, and that T. had no insurable interest to enable W. to recover on the assignment. On appeal from such decision to the Supreme Court of Canada,

Held, reversing the judgment of the Court below (20 N.S. Rep. 487) that the company having accepted the premiums from W. with knowledge of the fact that T. had ceased to have any interest in the property, they must be taken to have intended to deal with W. as the the owner of the property. And the contract of insurance was complete.

Appeal allowed with costs.

Graham, Q.C., for the appellants.

Henry, Q.C., for the respondents.

[May 6.

FORSYTH *v.* BANK OF NOVA SCOTIA.
IN RE BANK OF LIVERPOOL.

Insolvent bank—Winding-Up Act—Appointment of liquidators—Discretion of judge.

The liquidators appointed by a judge of the Supreme Court of Nova Scotia to wind up the affairs of the insolvent Bank of Liverpool, were those nominated at the meeting of the creditors called for that purpose, according to the requirements of the Winding-up Act, R.S.C. c. 129.

The Bank of Nova Scotia was one of the said liquidators, and by a judge's order the local manager at Halifax was appointed to act for the bank in such liquidation. On appeal to the Supreme Court of Canada, from the decision of the Supreme Court of Nova Scotia, affirming the appointment of liquidators,

Held, 1. That a bank can be one of the liquidators of a bank under the Winding-up Act.

2. That the Act does not require the nominees of both creditors and shareholders to be represented on the board of liquidators, and the judge having, in his discretion, appointed the representatives of one class only to be appointed, such discretion should not be interfered with.

3. The appointment would not be overruled by an appeal Court, unless it appeared that the judge making it was clearly wrong in his law, or that he acted under an evident mistake as to the facts.

Appeal dismissed with costs.

C. W. Weldon, Q.C., for the appellants.

R. L. Borden, Q.C., for the respondents.

[Dec. 14, 1889.

MARITIME BANK OF CANADA *v.* THE RECEIVER-GENERAL OF NEW BRUNSWICK.

Insolvent bank—Winding-up Act—Assets—Crown prerogative—Right of provincial government to exercise—Lien.

The Government of New Brunswick, as creditors of the insolvent Maritime Bank of Canada, claimed a first lien on the assets of the bank, as representing the Crown in the Province.

Held, reversing the judgment of the Supreme Court of New Brunswick, GWYNNE, J., dissenting that the Government was entitled to such lien; but

Held, also, Strong and Taschereau, JJ., dissenting, that the lien was to be exercised only after the note holders were paid, the prerogative being postponed to the lien of the noteholders, by virtue of the Bank Act, R.S.C. c. 120, s. 79.

This case was decided by STRONG, FOURNIER, TASCHEREAU, GWYNNE and PATTERSON, JJ.

A. A. Stockton and *C. A. Palmer*, for the appellants.

Blair, Atty.-Gen. of New Brunswick, and *Barker*, Q.C., for the respondents.

[Dec. 14, 1889.

MARITIME BANK OF CANADA *v.* THE QUEEN.

Prerogative of Crown—Insurance Co.—Money deposited in insolvent bank—Lien for.

The Dominion Safety Fund Life Association, a mutual insurance society doing business in Canada, deposited $45,000 in the Maritime Bank of Canada at St. John, N.B., andsent the deposit receipt to the Receiver-General of the Dominion, to hold as the deposit of the Association with the Government, as required by the Insurance Act, R.S.C., c. 124. The Maritime Bank having become insolvent, a claim was made by the Dominion Government for this sum of $45,000 and a further sum of $15,000 held on ordinary

deposit in the bank by the Crown, to be recognised as crown monies, and entitled to a first charge upon the assets.

Held (affirming the judgment of the Supreme Court of New Brunswick, GWYNNE, J., dissenting) that the Dominion Government, as representing the Crown in Canada, was entitled to a first lien upon the assets of the insolvent bank in respect to the said sum of $15,000, and that the lien was not taken away by the section of the Bank Act, R.S.C., c. 12, 120, which gives note holders a first lien on such assets, it not being competent for the legislature to deprive the Crown of its prerogative, except by express words to that effect. See the Interpretation Act, R.S.C., c. 1, s. 7, s-s. 46.

Held, also (reversing the judgment of the court below, STRONG, J., dissenting) that the Government could not claim such lien in respect of the sum deposited by the insurance association, it not being public money, but held by the Crown merely as trustees for the society.

The judges deciding this case were : SIR W. J. RITCHIE, C.J., and STRONG, TASCHEREAU, GWYNNE, and PATTERSON, JJ.

Appeal allowed as to the sum of $45,000, and dismissed as to the sum of $15,000.

A. A. Stockton and *C. A. Palmer*, for the appellants.

Weldon, Q.C., and *Barker*, Q.C., for the respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

COURT OF APPEAL.

From ROSE, J.] [March 5, 1889.

DANIELS *v.* MOXON.

Mortgage—Shares—Sale — Wilful neglect or default.

The defendant, who was mortgagee of certain shares in a manufacturing company, offered them for sale at auction, when one N. was declared the purchaser. The plaintiff, who was entitled to the shares subject to the defendant's claim, knew of and ratified the sale. The purchaser refused upon various grounds to carry out the sale, and no attempt was made by the defendant to compel completion of the contract. Subsequently the shares fell very much in value.

Held (BURTON, J.A., dissenting), that there was no duty cast upon the defendant to take proceedings against the purchaser to compel completion, and that he was not liable to account for the shares at the price that would have been realized had the sale been completed. The plaintiff could have paid the defendant's claim and then have herself taken proceedings against the purchaser, and not having done so was not entitled to complain.

Judgment of ROSE, J., affirmed.

McCarthy, Q.C., and *P. McPhillips* for the appellant.

W. Cassels, Q.C., and *F. R. Ball*, Q.C., for the respondent.

From FERGUSON, J.] [March 5, 1889.

DAY *v.* DAY.

Fraudulent conveyance—Intent to defeat creditors—Secret trust—Evidence—Pleading.

If a defendent wishes to set up in answer to an action to declare him a trustee of land, the defence that the land was conveyed to him for a fraudulent purpose, he must in his pleading specifically say so, and admit his own criminality in joining in a criminal act.

If the plaintiff can make out his case without disclosing the alleged fraud, the defendant will not be allowed to show as a reason why the plaintiff should not recover, the fraud in which the defendant himself participated.

Judgment of FERGUSON, J., reversed.

Hardy, Q.C., for the appellant.

J. W. Bowlby for the respondent.

From STREET, J.] [Jan. 14, 1889.

MCARTHUR *v.* THE NORTHERN AND PACIFIC JUNCTION RAILWAY CO., ET AL.

Railways—Constitutional law — Limitation of action—R.S.C., c. 109, s. 27—Timber licenses — Intervals between licenses — Trespass — Continuing damage—R.S.O. (1887), c. 28.

The defendants, a railway company incorporated by an Act of the Parliament of Canada, and subject to the provisions (among other provisions) of s. 27 of the Railway Act of Canada, built their road through lands in the Province of Ontario, the fee of which was in the Crown, but over which the plaintiffs had for three

successive years held timber licenses issued by the Provincial Government. These licenses, giving the right to cut timber and exclusive possession in the usual form, were dated respectively the 5th of July, 1883, the 10th of December, 1884, and the 22nd of July, 1885, and each extended from its date to the 30th of the next April. The defendants entered upon the limits in question about the end of the year 1884, and the road was completed in July, 1886. In building the road the defendants cut down timber on the line and also both within and outside of the six rod belts mentioned in the statute. No timber was cut after December, 1885. The plaintiffs brought this action on the 9th of September, 1886, to recover damages for the timber cut. It was admitted that as to timber cut outside the six rod belts they were entitled to recover, but it was contended that as to timber cut on the line and within those belts the action was barred. The defendants had filed their plan and book of reference, but they had not taken any of the statutory steps to acquire the interest of the plaintiffs.

Held, per HAGARTY, C.J.O., and OSLER, J.A., that the damage to the timber on the line and within the six rod belts was damage "sustained by reason of the railway" within the meaning of s. 27 of R.S.C., 109, and that that section was *intra vires* the Dominion Parliament. That the plaintiffs were entitled to damages for the illegal occupation of the limits, and as consequent thereon to damages for all injury done during the illegal occupation; but that the plaintiffs had no title to the limits sufficient to maintain an action, either on legal or equitable principles, in the intervals between the licenses. That, therefore, the right of action was barred except as to damages sustained during the currency of the last license, but was saved as to those by virtue of the occupation being illegal up to the 30th of April, 1886, less than six months before action.

Per BURTON, J.A., and MACLENNAN, J.A. That the section was *ultra vires* the Dominion Parliament as being an unnecessary interference with property and civil rights within the Province, but that even if valid would not avail for the protection of the defendants, as they were mere trespassers.

Per MACLENNAN, J.A. That even if the section were valid and applied, the plaintiffs were entitled to recover all the damages, the trespass having been a continuous uninterrupted one, and the plaintiffs' right of renewal of their licenses being sufficient to enable them to recover, notwithstanding the intervals between them.

The Court being divided in opinion, the judgment of STREET, J., 15 O.R., 733, was affirmed.

W. Nesbitt and *Aytoun-Finlay* for the appellants.

S. H. Blake, Q.C., and *E. Martin*, Q.C., for the respondents.

Irving, Q.C., for the Attorney-General.

From Chy.D.] [March 4.

MCDONALD *v.* MCDONALD.

Trusts and trustees—Executors—Acceptance of office—Purchase by trustee of trust property—Statute of Limitations.

The plaintiff and defendant were brothers, and their father who died in the year 1846, appointed the plaintiff and two other sons of the testator his executors, and among other devises devised the land in question to the defendant. The testator had endorsed a note for the accommodation of the plaintiff, and after the testator's death, the holders of this note sued the plaintiff and the two brothets as executors, and recovered judgment against them. The land in question was sold under that judgment at sheriff's sale, and was bought in by the plaintiff. The will had been registered, but had not been proved. Subsequently the plaintiff mortgaged the land in question, and sold it subject to the mortgage. The mortgagees afterwards sold, and the plaintiff again bought in the land.

Held, that the plaintiff and his brothers having defended the action on the note as executors, and judgment having been recovered against them as such, must be held to have accepted the office and want of probate was immaterial and the sheriff's sale was valid.

Held, also, that it being the plaintiff's duty to pay the note, he had not acquired title to the land for his own benefit at the sheriff's sale but, became a trustee for the devisee, the defendant, and that this trust revived when the plaintiff bought in the land for the second time.

Held, also, that assumiug that the plaintiff was not a trustee for the defendant and had no paper title, there was not, upon the evidence,

any possession of the land in question by the plaintiff sufficient to confer a title under the Statute of Limitations.

Judgment of the Chancery Division affirmed.

H. Symons for the appellant.

Moss, Q.C., for the respondent.

From Chy.D.] [May 13.

MACDONELL *v.* BLAKE.

Law Society—Bencher—"Retired Judge"—R. S. O. (1877), ch. 138, sec. 4—R.S.O. (1887), ch. 145, sec. 4.

A judge of a Superior Court of the Province of Ontario, who, after his voluntary resignation of his office, before he has become entitled to a retiring allowance, has been accepted, resumes the active practice of his profession, is a "retired judge" within the meaning of R.S.O. (1877), ch. 138, sec. 4, and as such is an ex-officio bencher of the Law Society of Upper Canada.

Judgement of the Chancery Division, 17 O.R., 104, affirmed, BURTON, J.A., dissenting.

J. Reeve for the appellant.

H. Cassells for the respondent, Blake.

A. H. Marsh and *Walter Read* for the respondents, The Law Society.

From Chy.D.] [May 13.

LEMAY *v.* CANADIAN PACIFIC R. W. CO.

Railways—Master and servant—Negligence—Any person injured—51 Vic., ch. 29. sec. 262, sub-sec. 3 (D).

A servant of a railway company is a "person" within the meaning of 51 Vic., ch. 29, sec. 262, sub-sec. 3 (D), and as such is entitled to recover damages if injured by the negligence of his employers.

Judgment of the Chancery Division, 18 O.R., 314, affirmed.

Robinson, Q.C., and *G. F. Shepley* for the appellants.

Delamere, Q.C., and *F. H. Keefer* for the respondent.

From Q.B.D.] [May 13.

BRADY *v.* SADLER ET AL.

Crown Patent—Reservation—Evidence.

The description of the lands conveyed by a Crown patent was "All that parcel of land containing by admeasurement sixty acres, be the same more or less, being composed of lot number nine, exclusive of the lands covered by the waters of the S. River."

Lot nine included, by metes and bounds, two hundred acres, but the S. River ran through it. At and for some time previous to the time of the issue of the patent the waters of the S. River at this place were penned back by a dam.

Held, that the words, "the waters of the S. River" did not mean the waters of the S. River flowing in its natural channel merely, or the waters at the height at which they might happen to be on the day of the issue of the patent, but had the effect of reserving from the grant that portion of the lot liable to be covered, owing to the existence of the dam, by the waters of the S. River at their natural height at any time during the ordinary changes of the seasons.

Held, also, that extrinsic evidence was admissible for the purpose of showing what was reserved under the description, and that, upon that evidence, the land in question had not passed under the grant.

Judgment of the Queen's Bench Division, 16 O.R., 49, reversed.

E. Blake, Q.C., *S. H. Blake*, Q.C., and *Stewart* for the appellants.

Robinson, Q.C., *Moss*, Q.C., and *H. O'Leary* for the respondents.

From Chy.D.] [May 13.

THE CORPORATION OF THE TOWNSHIP OF BARTON *v.* THE CORPORATION OF THE CITY OF HAMILTON.

Municipal corporations—Extending sewer through contiguous municipality—"Territory"—R.S.O. (1887), ch. 184, sec. 492, sub-sec. 2.

The "territory" of the municipality referred to in R.S.O. (1887), ch. 184, sec. 492, sub-sec. 2, is the land comprised within the bounds, and under the jurisdiction of, the municipality, and is not limited to lands that are the property of the municipality.

One municipality cannot, therefore, extend a sewer through lands within the bounds of a contiguous municipality, without the consent of the latter or without taking the statutory steps, even although the lands through which the sewer is to run have been purchased by the former municipality from the private owners.

Judgment of the Chancery Division, 18 O.R., 199, affirmed, BURTON, J.A., dissenting.

Moss, Q.C., and *MacKelcan*, Q.C., for the appellants.

S. H. Blake, Q.C., and *W. Bell* for the respondents.

[May 13.

THE ELECTRIC DESPATCH COMPANY OF TORONTO *v.* THE BELL TELEPHONE COMPANY OF CANADA.

Contract—Telephone Company—Covenant not to transmit orders.

This was an appeal by the plaintiffs from the judgment of the Chancery Division, reported 17 O.R., 495, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, JJ.A.), on the 11th and 12th of March, 1890.

The Court being divided in opinion, the appeal was dismissed with costs.

Per HAGARTY, C.J.O., and BURTON, J.A., the covenant in question was broken, subscribers being enabled by the active intervention of the defendants to give orders of the kind referred to to persons other than the plaintiffs.

Per OSLER and MACLENNAN, JJ.A. The covenant was not broken, the defendants taking no active part in the transmission of the messages, but merely allowing subscribers to communicate with one another in the usual manner.

Robinson, Q.C., and *Moss*, Q.C., for the appellants.

Lash, Q.C., and *S. G. Wood* for the respondents.

From Chy.D.] May 13.

CUMBERLAND ET AL *v.* KEARNS.

Covenant for titles—Local improvement rates.

The defendant joined in a petition for local improvements which were carried out and a rate therefore payable in ten annual instalments but subject to commutation was imposed upon the land benefited, including that of the defendant. Subsequently the defendants sold the land to the plaintiffs and conveyed it to them by deed made in pursuance of the Act respecting Short Forms of Conveyances and containing the statutory covenants for title.

Held, affirming the judgment of the Chancery Division, 18 O.R. 151, that the rate was an encumbrance created in part by the action of the defendant and that the plaintiffs were entitled to recover damages under the covenants, the amount recoverable being the smallest amount necessary to discharge the encumbrance.

Haverson for the appellant.

J. H. Ferguson, Q.C., for the respondent.

From BOYD, C.] [May 13.

IN RE DINGMAN AND HALL.

Sale of land—Contract—Time for completion—Interest.

Where in a contract for the sale and purchase of land the parties fix the time of payment of the purchase money and the time from which interest thereon is to be computed, irrespective of the time fixed for completion, interest must, in the absence of actual misconduct on the part of the vendor, be paid from the time named notwithstanding the existence of difficulties as to title justifying the purchaser in refusing to complete until they are removed.

Judgment of BOYD, C., reversed.

Moss, Q.C., and *Rowan*, for the appellant.

S. H. Blake, Q.C., and *Kilmer* for the respondents.

Co. Ct., Hastings.] [May 13.

BALDRICK *v.* RYAN.

Bills of sale and chattel mortgages—Affidavit of bona fides—Description of chattels—Concurrent mortgages.

The affidavit of *bona fides* in a chattel mortgage taken to secure the mortgagee against his endorsement of two promissory notes, which were referred to in a recital, stated that the mortgage "was executed in good faith and for the express purpose of securing *me* the said mortgagee therein named against *his* endorsement of *a* promissory *notes* for (*sic*) or any renewal of the said recited promissory notes."

Held, that "his endorsement" might be read "my endorsement," as this was clearly a clerical error, but that even with this correction the clause remained vague and incomplete, and that the affidavit was therefore fatally defective.

Held, also, (HAGARTY, C.J.O., dissenting) that the mortgagee was entitled to fall back on a previous mortgage covering the same chattels, given to secure him against his endorsement of certain notes, of one of which one of the two notes referred to in the later mortgage was a re-

newal, there being evidence that when the later mortgage was taken it was not intended to abandon the former one.

What is a sufficient description of chattels and animals discussed.

Judgment of the County Court of Hastings varied.

Hislop, for the appellant.

G. A. Skinner for the respondent.

Co. Ct., York.] [May 13.

HALL *v.* PRITTIE.

Assignment—Equitable assignment—Chose in action—Bills of Exchange.

One E. who had a contract with the defendant for certain carpenter's work gave to the plaintiff an order upon the defendant in the following form :—

"Please pay to H. the sum of $138.40 for flooring supplied to your buildings on D. road and charge to my account."

Held, that this was not an equitable assignment, but a bill of exchange, and that in the absence of written acceptance by her, the defendant was not liable.

Judgment of the County Court of York reversed.

R. S. Neville for the appellant.

Fullerton for the respondent.

Co. Ct. York.] [May 13.

IN RE HERR PIANO COMPANY. CENTRAL BANK'S CLAIM.

Trusts and trustees—Breach of trust—Following trust moneys.

Three persons occupying a fiduciary position towards the bank, became partners in the firm of H. & Co., agreeing to pay for their interests a certain sum of money in liquidation of creditors' claims. They did pay this sum but out of moneys of the Bank wrongfully appropriated by them. Subsequently the firm of H. & Co. was formed into a joint-stock Company and the assets of the partnership were asssigned by the partners to the Company. The Company soon afterwards failed and a winding-up order was made, the original assets to a considerable extent coming into the possession of the liquidator.

Held, that the original partners were not affected with constructive notice of the means by which the incoming partners obtained the moneys brought in and that no actual notice to them or to the Company being shown the Bank had no lien.

Judgment of the County Court of York reversed.

J. K. Kerr, Q.C., and *R. S. Neville* for the appellants.

W. R. Meredith, Q.C., and *F. A. Hilton* for the respondent.

Queen's Bench Division.

ROSE, J.] [April 23.

STRETTON *v.* HOLMES.

Negligence—Mistake in compounding medicine—Physician—Druggist—Costs.

A physician wrote a prescription for the plaintiff, and directed that it should be charged to him by the druggist who compounded it, which was done. His fee, including the charge for making up the prescription, was paid by the plaintiff. The druggist's clerk, by mistake, put prussic acid in the mixture made up pursuant to the prescription, and the plaintiff in consequence suffered injury.

Held, that the druggist was liable to the plaintiff for negligence, but the physician was not.

Under the circumstances of the case no costs were awarded to or against any of the parties.

A. M. Taylor for the plaintiff.

Garrow, Q.C., for the defendants.

STREET, J.] [May 1.

GIBBONS *v.* MCDONALD.

Bankruptcy and insolvency—Insolvent debtor—Mortgage to creditor—Preference—Notice or knowledge of insolvency—R.S.O., c. 124, s. 2.

A farmer mortgaged his farm for $600 to secure a debt of $571.50, due by him to the mortgagee, and the sum of $28.50, advanced at the time the mortgage was made. He knew at the time he made the mortgage that he was unable to pay his debts in full, and that he was giving the mortgagee a preference over his other creditors. The practical effect was that the mortgagee was paid in full, and that the rest of the creditors received nothing. The mortgagee, however, was not aware at the time he took the mortgage that the mortgagor was in insolvent circumstances.

Held, following *Johnson* v. *Hope*, 17 A.R., 10, that the mortgage was not void against creditors, under s. 2 of R.S.O., c. 124.

Garrow, Q.C., for plaintiff.

M. C. Cameron for defendant, McDonald.

Maybee for defendant, Heffernan.

STREET, J.] [May 1.

ROSE *v.* TOWNSHIP OF WEST WAWANOSH.

Municipal corporations—By-law authorizing taking of gravel without specifying lands—Illegality—R.S.O., c. 184, s. 550, s-s. 8; s. 338—Injunction without quashing by-law.

By s. 550, s-s. 8, of R.S.O., c. 184, the council of every township is authorized to pass by-laws for searching for and taking such timber, gravel, stone, or other material or materials as may be necessary for keeping in repair any road or highway within the municipality.

Held, that the meaning of this section is that the council may, as necessity arises for their doing so, exercise the right to take gravel, etc., from any particular parcel or parcels of land, having first declared the necessity to exist, and chosen and described the land from which the material is to be taken by a by-law, and therefore a by-law purporting to be passed under this section, which authorized and empowered the pathmasters and other employees of the corporation to enter upon any land within the municipality, when necessary to do so, save and except orchards, gardens, and pleasure-grounds, and search for and take any timber, gravel, etc., was upon its face illegal, because it purported to confer upon its officers wider and more extensive powers than the statute authorized.

Held, also, notwithstanding the provisions of s. 338 of R.S.O., c. 184, that the plaintiff was entitled, without quashing the by-law, to an injunction to restrain the defendants from proceeding to enforce the rights they claimed under this by-law by entering upon his lands.

Garrow, Q.C., for plaintiff.

M. C. Cameron for defendants.

ROBERTSON, J.] [April 29.

RE INGOLSBY.

Will—Execution—Construction—Election under devolution of Estates' Act.

B. I. died intestate June 15, 1889. His wife died August 31st following, having made her will August 28th, in which she elected to take a distributive share of her husband's estate in lieu of dower.

Held, that although the will must be construed to speak as if executed immediately before the death in regard to the real and personal estate comprised therein, it took effect and became operative immediately after its execution in regard to the declaration of election, and that such declaration was a good declaration under sec. 4 (sub-sec. 2) of the Devolution of Estates Act.

McKechnie for the executor of the widow.

J. Hoskin, Q.C., for the infants.

Practice.

GALT, C.J.] [May 10.

ATTORNEY-GENERAL *v.* ÆTNA INSURANCE COMPANY.

Interest—Fire insurance — Reference — Powers of referee.

In an action upon fire insurance policies, a referee was directed to inquire, ascertain, and report the amount of the loss.

Held, having regard to the provisions of ss. 87 and 103 of R.S.O., c. 44, that the referee had authority to allow interest on the amount of the loss, as ascertained by him.

Irving, Q.C., for plaintiff.

W. B. Raymond for defendants.

ROSE, J.] [May 20.

HUDSON BAY CO. *v.* HAMILTON.

Appearance—Notice of, where entered late—Judgment for default—Rule 281.

Judgment may be signed under Rule 281 for default of appearance, where an appearance has been entered after the time limited, if no tice has not been given as required by the Rule and the knowledge of the fact that an appear ance has been entered, does not constitute such notice as the Rule requires.

Smith v. Dobbin, 3 Ex. D. 338, followed.

Lanark and Drummond Plank Road Co. v. Bothwell, 2, U.C.L.J.O.S. 229, not followed.

A. C. Galt for the plaintiffs.

Law Students' Department.

EXAMINATIONS BEFORE EASTER TERM : 1890.

FIRST YEAR.

Contracts.

1. In what different ways may an offer lapse?

2. What is the effect of a promise to keep an offer open for acceptance for a certain time? Why?

3. In what different ways may a contract originate?

4. How far can a party be held responsible for the consequences of false representation not made to the person who is injured by it? Explain.

5. Under what circumstances may a party recover money or goods which he has paid or delivered under an illegal contract?

6. What exceptions are there to the rule that past considerations will not support a promise?

7. In what cases is a request required to precede a promise, and when will the request be implied?

8. What is the difference in legal effect between mistake of intention and mistake of expression? Illustrate by example.

Broom's Common Law.

1. Explain fully the term Common Law.

2. Mention the rules for the construction of Statutes.

3. What is meant by the *Law Merchant?*

4. Explain the meaning of *injuria* and *damnum.*

5. Give an example of

Damnum absque injuria, damnum et injuria, injuria sine damno.

6. When can an individual maintain an action for a public nuisance? Example.

7. What is law as to merger of the tort in the felony where the same act is both the one and the other?

8. What is the law as to the immunity of Justices from actions at law? State the Statutory provisions.

9. What is the law as to the liability of (1) an Infant (2) a Lunatic (3) a Married Woman for torts committed by them respectively?

10. When will the intervening negligence of a third party not prevent a plaintiff recovering for the negligence of the defendant?

11. What is the liability of a master for an injury to his servant caused by the negligence of a fellow servant?

12. What is the law as to the liability of a person who does a bodily damage to another without any fault on his part?

Real Property.

1. Distinguish between a "general" and a special occupant.

2. Define an estate tail. How many different kinds may there be? Which is the larger, an estate tail or an estate for life? What statute, if any, was there passed dealing with estates tail during the reign of Edward 1st, and what was its purport?

3. Define dower and estate by the curtesy having reference to both legal and equitable estates.

4. A grant is made of certain lands to A. and B. (who are husband wife) and their heirs; what estate do they each take, and what are their several rights as to disposing of the lands? What difference, if any, would there be if A. and B. were strangers to each other?

5. Prior to the reign of Henry VIII., what power had an owner of an estate in fee simple to dispose of the same by will? What statutory provisions were there made in reference thereto during that reign?

6. Distinguish between a contingent remainder and an executory devise.

7. A. the owner of Blackacre wishes to convey the same to himself, and B. as tenants in common; can he do so? Reasons.

8. A. makes a will devising all his real estate to B., subsequent to his will and prior to his death, he purchases a farm in the township of York. Will B. take this farm under the will? Reasons for your answer.

9. A. by will leaves $5,000 to be expended in masses for his soul. Is the bequest good? Explain fully.

Equity.

1. Sketch briefly the origin and gradual enlargement of Equity Jurisprudence from its inception down to the present day.

2. Explain and exemplify the maxims "Equality is Equity," and "Qui prior est tempore potion est jure."

3. Trace briefly the origin and rise of trusts. What was the object of the Statute of 27 Henry VIII., and how, if in any way, was its object defeated?

4. What are the enactments of the Statute of Frauds in respect of trusts concerning real estate?

5. It is said that a trustee cannot delegate his trust. Is there any exception to this rule? If so, what?

6. What is a constructive trust? Give an example of one.

7. What rules govern in respect of general, specific, and demonstrative legacies respectively, when after payment of testator's debts there is a deficiency of assets for the payment of all the legacies?

8. Define the equitable doctrine of satisfaction, and state the general rules which govern where a question is raised as to whether or no a legacy is a satisfaction or a debt.

9. Write a short note on the law respecting the enforcement by specific performance of (1) contracts for the sale of land; (2) contracts for the sale of personal chattels, and state the requisites of a contract for the sale of land so that the same shall be binding.

10. State the law as to the right of a solicitor to purchase from his client during the pendency of the relationship between them.

Contracts—Honors.

1. Explain the difference between executed consideration and past consideration.

2. With regard to a promise to answer for the debt of another, does it make any difference under the Statute of Frauds whether the promise is made to the debtor or creditor? Why?

3. If an agreement not to be performed within a year provides that either party may put an end to it by giving a month's notice, how far does the Statute of Frauds apply? Why?

4. What is the effect of a letter of acceptance being lost and never reaching its destination? If the letter were one of revocation, how would the loss affect the parties? Why

5. Sketch briefly the history of the development in English law of the action for enforcing executory contracts.

6. A debtor wishes his creditor to accept a smaller sum than is due him in full of his claim, and the creditor agrees thereto in writing. How far is such agreement binding? Why?

7. What is the difference between the legal status of the contract of wager in England and in Ontario? Explain.

8. In the case of negotiable instruments for money payable under a contract, what difference does it make whether the contract be made illegal by statute, or made void by statute?

9. What is the test by which it is decided whether a party can enforce a contract growing out of or connected with an illegal transaction?

10. Can a plaintiff who has given no value for a note, recover on it against a maker who has received no value? If so, when?

Common Law—Honors.

1. Explain what is meant by *contributory negligence.*

2. When can a man by ratifying a tort committed by another take the benefit of such tort?

3. What difference is there between a man's right to use force to turn out a trespasser who has entered peaceably, and his right to use force to prevent a forcible entry?

4. What is the effect of Lord Campbell's Act?

5. Where an action is brought against two joint wrong-doers, and one has caused a much greater portion of the damage than the other, how much can the plaintiff recover from each? Why?

6. What different kinds of malice are there, and what is the difference between them?

7. When is a principal liable for a false representation by his agent?

8. Explain estoppee and distinguish the kinds of estoppee.

9. Illustrate by example the difference between trespass *ab initio*, and trespass by relation when the thing done was lawful at the time.

10. Into what three great classes are Bailments divided, and what degree of care is required in each of the three classes?

Real Property—Honors.

1. What, if any, statutory provision is there with regard to the release from a rent charge of part of the lands charged therewith? If there be such legislation, why was it enacted?

2. Is it necessary for a defendant who is relying on the ground of being a purchaser for value without notice to prove payment of the purchase money? If so, why? If not, why not?

3. Give an example of a tenancy in tail after possibility of issue extinct, with reasons.

4. Explain briefly how conveyance by way of lease and release became at one time so prevalent as it was.

5. A. leases property to B., who sub-leases to C.; the rent falls in arrears. Can A. sue C. for the same? Reasons.

6. Distinguish between the effect of (*a*) a gift to the first son of A. (a living person), who shall attain the age of twenty-four years; and (*b*) a gift to the first son of B. (also a living person), who shall attain the age of twenty-one years. Reasons for your answer.

7. What statutory provision is there as to the right of a mortgagee to set up the defence of purchase for value without notice?

8. What is the effect of a lease from A. to B., reserving rent to C., a stranger? Explain.

9. "A.," a legatee under a will, is one of the witnesses to a will. What effect has this on the will? "B.," a creditor of the testator, witnesses the execution of the will, which contains a charge for the payment of debts. Distinguish this from the first-mentioned case, if there be any distinction.

10. Can a man covenant to stand seized to the use of his son-in-law? If so, why? If not, why not?

Equity—Honors.

1. Define and illustrate the equitable doctrine of consolidation, giving an example; distinguish consolidation from taking, and give an example of the latter.

2. Define constructive fraud, and give an illustration.

3. Under what circumstances will a Court of Equity grant relief in cases of non-execution of a power?

4. State what are, and what are not, sufficient acts of part performance of a parol contract for the sale of lands in order to take the same out of the statute.

5. Under what class of contracts is silence on the part of one of the contracting parties deemed tantamount to actual affirmation?

6. A. and B. enter into a commercial partnership for a period of five years; the time expires and they still continue trading as partners. What relationship exists between them?

7. What is the test question as to whether an author, in writing a book, has been guilty of infringement of the copyright in another author's work?

8. Write a short note as to the law regulating contracts in restraint of marriage, and contracts in restraint of trade. Under what head of equity are they classed.

9. Explain what is meant by marshalling of assets.

10. What distinction is there as to the application of the doctrine of resulting trusts between cases where conversion partially fails when it is directed by will, and when it is directed by deed?

Law Society of Upper Canada.

LAW SCHOOL—HILARY TERM, 1890.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

CURRICULUM OF THE LAW SCHOOL.

Principal, W. A. REEVE, Q.C.

Lecturers, E. D. ARMOUR. A. H. MARSH, LL.B.

Examiners, R. E. KINGSFORD, LL.B. P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks.

The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto, are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1890, fourteen Scholarships in all will be offered for competition, seven for those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students.

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School:

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Pmith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

VOL. XXVI. JUNE 16, 1890. No. 11.

ON another page will be found the list of the Autumn Assizes which has just been published. Mr. Justice Falconbridge takes the Summer Assizes at Toronto, commencing June 10th, the Assizes at Bracebridge on July 14, and at Parry Sound on July 17. Mr. Justice Street will take the sittings at Sault Ste. Marie, commencing July 11, and at Port Arthur on July 18.

THE following Rules of the Supreme Court of Judicature for Ontario were passed on June 13, 1890:—

1,265. In the absence of the Clerk in Chambers, orders made by a judge of the High Court in Chambers may be signed by the assistant Clerk in Chambers; and such orders signed by the said assistant Clerk in Chambers shall have the same force and validity as if signed by the Clerk in Chambers.

1,266. All appeals to a Judge in Chambers from the report, certificate, order, decision, or finding of any officer of the court must be argued by counsel.

1,267. Rule 1,262 is amended by striking out the words "the County of York" and substituting therefor the words "any county."

IN *re The London and Ontario Investment Company and Young*, which came up lately before Mr. Justice Street on appeal from one of the Taxing Masters on a question of mortgagees' costs of sale proceedings, a decision was given which will delight the hearts of mortgagees' solicitors. The mortgage from Young to the Company provided that on default the mortgagees might exercise the power of sale therein contained without notice. Upon default taking place, the mortgagees proceeded to sell under the power, and prepared and served notices of sale upon the mortgagor, his wife, and a tenant of the mortgaged premises. A bill of the mortgagees' costs of sale was rendered at $138.95, exclusive of the costs of taxation. Upon the taxation of this bill the mortgagor objected to the allowance of the costs of the preparation and service of the notices of sale, amounting to $33.55, and the objection was sustained by the Taxing Master on the ground that the service of the notices was unnecessary and improper. Upon an appeal from this ruling it was contended with great force by counsel for the mortgagor that the mortgagees themselves had drawn up a contract in their own interest and for their own benefit dispensing with notice, and to say

that a further personal notice was required by implication would be equivalent to annexing a condition to the power of sale which the maker of the power did not see fit to provide, and the court would be making a contract for the parties instead of enforcing the one made by themselves; that the right to costs is a matter of contract, and that these costs being unnecessary under the contract the mortgagor could not be charged with them (see *Canada Permanent* v. *Teeter*, 19 O.R., 156). The court, however, held that the charges were proper and necessary, and as it was on a question of costs, there could be no appeal from this decision. In *Canada Permanent* v. *Teeter* it was held that the service of a notice of sale where the power requires no notice to be served, is a voluntary act, and is therefore unnecessary. Also in c. 27 of the Ontario legislation of last session, there is an express recognition of the validity of a sale under a power of sale providing for sale without notice. For these reasons we think that the decision is erroneous, and that the Taxing Master was right in holding the charges to be unnecessary and improper.

LEGAL documents are sometimes ridiculed by the unlearned for their apparent verbosity, and for the way in which the draftsman rings the changes on past, present, and future tenses, and attempts to provide for all sorts of contingencies; but the strict way in which written instruments are construed by the Courts shows that what seems to the unlearned foolishness is often a grave necessity. This is well illustrated by two recent cases of a very dissimilar character, the one relating to the construction of a contract not to carry on a particular business, *Stuart* v. *Diplock*, 43 Chy. D., 43, noted *ante* p. 232, in which it was held that the contract was not violated by the carrying on of a part of the trade in question. Here the omission of the familiar form of words " or any part thereof," proved fatal to the plaintiff's claim to restrict the defendant from carrying on the business in question altogether as was probably intended. The other case is *Re Wormald, Frank* v. *Muzeen*, 43 Chy.D., 633, noted post p. 328, in which the construction of a forfeiture clause in a will was in question. The will contained a devise and bequest to trustees upon trust for a married woman for her separate use " without power of anticipation," with a gift over " on her anticipating " the rents and income or any part thereof: and it was held that the words "anticipating " did not include " attempting to anticipate," and though the married woman had in fact executed a mortgage of her interest, yet this invoked no forfeiture because the mortgage was void and inoperative, and was a mere attempt to anticipate, which was not provided for. There can be little doubt that this was just the kind of act the testator wished to guard against; he did not intend to provide for a contingency which could not possibly happen, but for a contingency which might happen, viz., the attempt of the beneficiary to evade the restriction or enjoyment which he had seen fit to impose, and yet the draftsman of the will probably failed to carry out his client's instructions because he neglected to introduce into the forfeiture clause the words " or attempt to anticipate." As we have said before, these cases illustrate the necessity of that amplitude of expression which, though fatal to elegance of style, is necessary to the legal effect of instruments.

IMPRISONMENT FOR DEBT UNDER THE DIVISION COURTS ACT.

The statement is often made that imprisonment for debt no longer exists, and has long been abolished, like hanging in cases of larceny, and other barbarous punishments of a ruder age. Yet there nevertheless is a sense in which imprisonment for debt still exists, whilst the theory is that this engine is only applied in cases of fraudulent or contumacious debtors who refuse to make satisfactory explanation of the disposition made by them of their property, or disobey the orders of Court for payment where the Court is satisfied that they are able to pay the debt. Besides the committal clauses of the Division Courts Act there are several chapters in the Revised Statutes of Ontario which deal with this subject.

Chapter sixty-seven of the Revised Statutes is entitled, "An Act respecting Arrest and Imprisonment for Debt," and makes provision in certain cases, and where the amount of the claim is $100 or upwards, for the imprisonment of debtors and their detention until satisfactory bail is furnished by a bond of not less than two or more than four sufficient sureties, conditioned that the person shall observe and obey all notices orders and rules of the Court concerning the debtor or person ordered to pay, or his appearing to be examined *viva voce* or otherwise, or his returning or being remanded into close custody. In the following chapter, relating to Indigent Debtors, certain relief is given to debtors in close custody for debt, and it is provided that in certain cases the debtor may obtain an order that the creditor pay the debtor a weekly allowance of $2 for his support, and in default of payment the debtor may demand his discharge. But the debtor is not, however, to be entitled to such allowance or to his discharge if, upon an examination pending the application, he fails to make full answer concerning any property or effects of which he may be possessed, or to which he may be entitled, or under the control of some other person for his use and benefit, or which he may have fraudulently disposed of to injure his creditor. By another section of the same Act provision is made for a motion by the debtor for his unconditional discharge upon his making oath that he is not worth $20 exclusive of the goods and chattels exempt from execution, and that he has submitted himself to be examined pursuant to order, or that no such order has been served, and upon the hearing of the application (if such examination has taken place) if the matter thereof is deemed satisfactory, the debtor shall be discharged from custody, but not, of course, from his liability to pay the debt. The Court exercises a discretion on such applications, but the leaning is in favor of the discharge of the debtor, if he has given a reasonable account of the disposition made by him of his effects; but in cases where the debt was contracted by any manner of fraud or breach of trust, or without reasonable assurance that it could be paid, or the debt is a judgment recovered in an action for breach of promise of marriage, seduction, crim. con., libel, or slander, the Court may order his re-committal for a period not exceeding twelve months, and to be then discharged.

It is, however, with the question of imprisonment under committal orders under the judgment summons clauses of the Division Courts Act that we propose to deal shortly in these pages. Some time ago this journal invited discussion on the utility of these clauses, and several communications were received and published from County Court Judges, who were concerned with the practical working of the Act. They were all of opinion, and it will be found to be that of the majority, that these clauses provide a speedy and inexpensive method of making collections of a considerable amount of money which otherwise could not be collected at all, and of making fraudulent debtors and deadbeats (a numerous class unfortunately in our cities and towns) pay up small accounts owing to tradesmen and mechanics, who could ill afford to lose the money.

When a suitor has recovered judgment for debt, damages, or costs, for an amount within the jurisdiction of the Division Courts, he has two courses open to him. He may proceed either against the goods or against the person of his debtor. If the debtor is a poor man the usual course is to proceed against him personally. A large proportion of his chattels are now exempt from seizure, and what is not exempt may be of no value, or may be claimed by some third person, sometimes justly, but more usually unjustly, to protect the debtor. Small traders often have a friendly bill of sale or chattel mortgage covering their goods, or an obliging landlord with rent in arrear, and some very small people take refuge under the Married Woman's Property Act. If the judgment is against the husband, the goods are claimed by the wife, and if against the wife, the husband puts in a claim. It is impossible for a creditor, without the tedious and expensive process of interpleader, in which he may not be successful, to find out under which thimble the pea really is. His usual course, under such circumstances, is to take advantage of the judgment summons clauses of the Division Courts Acts. By section 235 of the Act a judgment debtor may be examined upon oath before the judge at the instance of his creditor, touching his estate and effects, and the manner and circumstances under which he contracted the debt or incurred the damages or liability which formed the subject of the action, and as to the means and expectation he then had, and as to the property and means he still has of discharging the debt, and as to the disposal he has made of any property: provided the creditor or his agent shall, before the issue of the summons, make and file with the Clerk of the Court, an affidavit stating that the judgment remains unsatisfied, his belief that the debtor is able to pay the debt, and that he is liable to be examined under the Act. If the party so summoned does not attend on the examination, or attends and refuses to be sworn, or refuses to make satisfactory answers on the matters above mentioned; or if it appears to the judge, from the examination of the debtor or by other evidence that the creditor obtained credit or incurred the liability under false pretences, or by means of fraud and breach of trust, or has made or caused to be made any gift, delivery, or transfer of any property, or has removed or concealed the same with intent to defraud his creditors or any of them; or it appears to the satisfaction of the judge that the debtor had, when summoned, or since judgment, sufficient means and ability to pay the debt, the judge may, if he thinks fit, order such party to be committed to the

common gaol where the debtor resides or carries on business, for any period not exceeding forty days. By another section, the judge before whom the summons is heard, may, if he thinks fit, rescind or alter any order for payment previously made, and make any further order either for the payment of the whole debt forthwith, or by instalments, or in any other manner that he thinks reasonable or just. If the Court is not satisfied with proof of means, it may dismiss the summons or make an order for payment by instalments of the sum due. It has recently been held that no order of committal can be made against a married woman in respect of any judgment arising out of contract, as her contracts, under the Married Woman's Property Act, bind her estate and not herself personally (see *Scott* v. *Morley*, 20 Q.B.D., 120). The person obtaining the summons may summon and examine all witnesses whom the judge thinks requisite, on all the subjects mentioned above, and the debtor may also be required to give an account of the disposition made of property in his possession before the debt was contracted: *Ontario Bank* v. *Mitchell*, 32 C.P., 73. The debtor is bound virtually to give a full exposition of his affairs, and his answers should show a satisfactory disposition of his property, and any illegal and wrongful disposition of his property, or by gambling, etc., would be deemed unsatisfactory (see *Graham* v. *Devlin*, 13 P.R., 245).

The jurisdiction to imprison is within certain limits discretionary, so that each judge enforces the sections of Act according to his own views. The usual way is after an order has been obtained for payment of the whole debt, or by instalments, to commit on default being made. But a commital ought clearly to take place only when there has been wilful default in payment; because strictly the power of committal is not an imprisonment for debt; it is an imprisonment for past dishonesty together with the prospect of the plaintiff getting his money (see *Stonor* v. *Fowle*, 84 L.T., 173). In this way a great deal of money is collected with very little actual imprisonment. In the administration of the Act the question very often arises as to the meaning of the word "means" in section 235. Is it sufficient to show that money exceeding the judgment debt has passed through the debtor's hands since the judgment was given, or should the necessary expenses of the debtor be deducted and the surplus only considered as "means"? We think the correct practice is before committal to make inquiry as to the debtor's family, and what other payments he has to make; for if a judgment debt were to have priority over current expenditure it would necessarily result in forcing the debtor still deeper into the quagmire of debt.

It is also advisable that the judge should in the exercise of the jurisdiction to commit, inquire into the consideration of the judgment debt, and take a stricter or more lenient view of the debtor's means according to the circumstances under which the debt was incurred. In cases where the debt has been contracted under circumstances which show criminal fraud, or where, in the belief of the judge, either of the parties is supporting his case with perjured evidence (and the experience of most Division Court Judges is that a large number of the cases before them are of that kind, and that the atmosphere of the court fairly reeks with perjury), a much stricter view should be taken of the debtor's means than

in the case of the poor wretch who is run into debt by a spendthrift wife, or gets into the hands of Shylocks or sharks. No doubt it is sometimes a difficult matter for the judge to learn the truth as to the debtor's means, and he frequently has an anxious and unpleasant task. The plaintiff, on the examination of the debtor, is prepared to show that the defendant is receiving a good salary, is living in fine style, or has expectations, or has contracts on hand, or is engaged at work from which he must necessarily make enough to enable him to pay. If the debtor does not appear it would be wise in the judge to take these statements subject to a mental discount of fifty per cent. In most cases the defendant appears in person, having donned his worst clothes—ragged and out of elbows—with a pitiful tale of woe. Dr. Johnson somewhere says that "human nature is a d——d rascal," and that is often very apparent in the examination of judgment debtors. In such cases a skilful examination, especially when the examiner has posted himself as to the debtor's means and antecedents, will be effectual in exposing the sham cases. In cases of actual poverty and distress the judge should exercise his discretion and make a light order of $1 a month, or give him time to pay. In several of the counties in this Province these sections of the Act are a dead letter. The debt-collecting business of the Division Court is no doubt loathsome work, and to judges it may be disgusting to be made the instrument of the legalized tyranny of small money lenders and local Shylocks, or to collect debts which would never have been incurred were it not for the demoralizing system of selling on credit. The consequence is that in such counties a great amount of money remains uncollected because of this neglect. And the amount of money actually collected bears but a small proportion of the amount which is paid on account of these clauses of the Act being carefully enforced. In the City of Toronto the information of the officers of the courts is that the amount of money collected by these means, directly or indirectly, does not fall far short of $100,000 per annum. The fact is that a vast body of people in Toronto will not pay their small debts without compulsion of law, the ultimate resort being the power of imprisonment. If imprisonment were abolished this compulsion would be gone, and tradesmen ruined by uncollectable debts. So far from advocating the repeal of the committal clauses of the Division Courts Act we should like to see them enforced by the Division Court judges in all the counties of the Province; not with unnecessary harshness, but with the exercise of a wise discretion, and in the spirit of the enactments in that behalf.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We continue the Law Reports, Chancery Division, for May.

MARRIED WOMAN—CHOSE IN ACTION—TITLE OF HUSBAND—GENERAL PROBATE OF WILL OF MARRIED WOMAN.

In *Smart* v. *Tranter*, 43 Chy.D., 587, the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) have reversed the judgment of Kay, J., 40 Chy.D., 165 (noted *ante* vol. 25, p. 158). It will be remembered that in this case a woman married

before 1882 who was entitled to *choses in action*, but had no separate property, nor any property of which she could dispose by will; made, without the assent of her husband, a will, by which she appointed executors, and gave all her property away from her husband. After her death, probate of her will was granted in general form to one of the executors. This action was brought by the husband against the executor to recover the *choses in action*. Kay, J., dismissed the action on the ground that so long as the probate remained unrevoked the plaintiff could not claim adversely to the will, and that his remedy was to appeal to the Probate Division to revoke the probate, and to grant him administration of such estate of his wife as she could not dispose of by will. But the Court of Appeal decided that the effect of the general probate was only to enable the executor to get in all the assets of the wife, whether she had power to dispose of them by will or not, and did not affect the beneficial title to them; and that as to the *choses in action* to which the husband was entitled, the executor became trustee of them for him, and that the husband was entitled to have them transferred to him subject to the same deductions as they would have been subject to, if the husband had taken out administration under the old practice, under which the probate would have been limited to such part (if any) of the estate as the wife could properly dispose of by will, and administration as on an intestacy granted as to the rest of the estate.

ADMINISTRATION—DEBTS—MARSHALLING ASSETS—PECUNIARY LEGACIES—REAL ESTATE CHARGED WITH DEBTS.

In re Bate: *Bate* v. *Bate*, 43 Chy.D., 600, a question arose whether, where real estate was devised charged with payment of debts, the real estate could be resorted to, before the personal estate not specifically bequeathed, including what was required for payment of pecuniary legacies, had been exhausted. Kay, J., answered this question in the negative, and in so doing took occasion to point out that the statements to the contrary in Seton on Decrees, 4th ed., 989, 990, Snell's Principles of Equity, Jarman, and Theobald were erroneous.

PRACTICE—REVIVOR—ACTION FOR INJUNCTION AND DAMAGES—DEATH OF SOLE PLAINTIFF.

In *Jones* v. *Simes*, 43 Chy.D., 607, a motion was made to discharge an order to continue proceedings taken out by the executor and devisee of a sole plaintiff who had died. The action was for a mandatory injunction, and damages for obstruction of light to a freehold house. The plaintiff died more than six months after the writ issued. It was contended that the cause of action did not survive; but it was held by Chitty, J., that as to the damages, inasmuch as under Ord. xxxvi., r. 58, in the case of a continuing damage, the damages are now to be assessed not merely up to the date of the writ as formerly, but up to the time of the assessment, the executor might continue the action to recover damages accrued within six months prior to the testator's death, to which he would be entitled under 3 & 4 W. 4, c. 42, s. 2 (and see R.S.O., c. 110, s. 9, which contains no limit as to six months). We may observe, however, that there appears to be no provision in Ontario by rule or statute similar to that contained

in the English Ord. xxxvi., r. 58, and consequently as to damages accrued between the date of the writ and the death of the plaintiff the present case would probably be no authority in Ontario, and here a new action for such damages would be necessary. As regards the equitable remedy to have the obstruction to the light removed, it was held that this was a right which passed to the devisee, by whom the proceedings to enforce it might be carried on. This equitable right, it was held, did not stand on the same footing as the old common law right of action for a tort.

POWER OF APPOINTMENT—INVALID EXERCISE OF POWER—FRAUD ON POWER—APPOINTMENT TO OBJECT OF POWER WITH UNWARRANTED DIRECTIONS FOR SETTLEMENT—TRUST FOR PERSONS NOT OBJECTS OF POWER.

In re Crawshay, Crawshay v. *Crawshay*, 43 Chy.D., 615, is a case on the law of powers, and illustrates the rule that any appointment in favour of other objects than those contemplated by the power, whether by trust or otherwise, is an invalid exercise of the power. In this case a testator had power to appoint £35,000 to and among his children. By his will he bequeathed £150,000 to trustees for his daughter Jessie for life, and after her death for her children. The will then recited the power of appointment of the £35,000, and by virtue of the power the testator appointed £10,000 thereof in favour of Jessie, but directed this sum to be paid to the trustees of the £150,000, to be held on the same trusts. He also appointed £17,000 in favour of two other daughters, and the residue of the fund of £35,000 he appointed to his son Robert absolutely; and in case he had exceeded his power in not appointing the £10,000 to Jessie unconditionally, and in case his daughter or her husband, or any other person, should object to the settlement, or should not confirm it, if required so to do, then he appointed the £10,000 to his son Robert, "but who will, I am assured, settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid, so as thereby to carry out my wishes." After the testator's death, his son Robert executed a declaration of trust of the £10,000 to carry out his father's wishes. There was no evidence (other than the will itself) of any bargain between the testator and his son that the latter should settle the £10,000. North, J., upon the application of the trustees raising the question as to the validity of the appointment, determined, (1) that the appointment in favour of the daughter Jessie, being accompanied by the condition as to settlement of the £10,000, was for that reason invalid; (2) that the £10,000 did not pass to Robert under the appointment of the residue, but (3) under the last appointment to the son, there being no evidence of any bargain by the son to settle the fund, but only an expression of the testator's wish that he should do so, the fund would pass to the son absolutely, free from any obligation to settle it, and therefore it was validly appointed.

WILL—CONSTRUCTION—GIFT TO MARRIED WOMAN FOR LIFE WITHOUT POWER OF ANTICIPATION—GIFT OVER "ON HER ANTICIPATING" THE INCOME—MORTGAGE OF LIFE INTEREST.

The question *In re Wormald, Frank* v. *Muxen*, 43 Chy.D., 630, was whether a gift over of a fund bequeathed to a married woman for life without power of

anticipation, took effect on her executing a mortgage of her life interest during coverture. North, J., was of opinion that "anticipate" did not mean "attempting to anticipate;" that the mortgage of the life interest was entirely inoperative, and consequently there was no forfeiture.

WILL—FORFEITURE CLAUSE—ABSOLUTE GIFT—BANKRUPTCY.

Metcalfe v. *Metcalfe*, 43 Chy.D., 633, was a case in which the effect of a forfeiture clause in a will had to be construed. By the will the testator gave personal estate to his children as tenants in common. He then gave to trustees real and personal estate, on trust, to pay the rents and profits to his children as tenants in common during their lives, with benefit of survivorship. He then gave certain reversions to trustees on similar trusts. And he provided that if by act or operation of law any interests given by his will in trust for his children should be aliened whereby the same should vest in any other person, then his trustees should apply the interest so aliened to and among the other persons entitled by survivorship, as in case of the death of the person so aliening. One of the children was, at the testator's death, a bankrupt. Within a year afterwards she became entitled to property which, when sold, was sufficient to pay her debts and the costs, but the bankruptcy was not formally annulled until two years after that. Kekewich, J., decided that as to the absolute gift of a share of the personal estate, the forfeiture clause was repugnant and had no effect. He also held as to the remainders not come into possession before the annulment of the bankruptcy, that as personal enjoyment by the legatee was not interfered with, the forfeiture therefore did not take effect And that for the purpose of ascertaining when the annulment of the bankruptcy took effect, the time when the bankrupt came into legal possession of property enough to pay her debts and the costs, and not the time of the formal annulment of the bankruptcy, must be taken.

POWER—EXECUTOR RENOUNCING—EXERCISE OF POWER BY EXECUTOR RENOUNCING.

The only other case to be noticed is *Crawford* v. *Forshaw*, 43 Chy.D., 643. In this case a testator appointed three executors. He then gave the residue of his estate to certain charitable institutions or others as "my executors herein named may select, to be divided in such proportions as they may approve of." Two of the executors proved the will, and the third renounced. On the application of the two executors it was determined by Kekewich, J., that the renouncing executor, notwithstanding his renunciation of probate, was entitled to join with the two executors in exercising the power of appointing the residue. That this was a power imposed on the executors, not as part of their office as executors, but as trustees.

Notes on Exchanges and Legal Scrap Book.

SOME CURIOUS PLEAS.—A man was once tried in Illinois for horse-stealing, upon evidence sufficiently conclusive to satisfy even his own counsel that conviction was inevitable. Still, that worthy was in no way daunted, but, rising for the defence, said he should not attempt to controvert the evidence before the court, but would put in a plea of matrimonial insanity. "Matrimonial insanity!" exclaimed Judge W——, mated, as everybody knew, to a most unamiable woman. "That is a novel defence; but let us hear the evidence." A witness was soon in the box who had known the prisoner for ten years, and deposed that in that time the delinquent had married half a dozen times and was living with his sixth wife when arrested. "Well," continued the witness, "if any of them was better than the others, I am not aware of it; they were all a sorry lot. They kept the man constantly in hot water by their peevish, scolding, quarrelsome dispositions." Other witnesses having confirmed this account of the prisoner's matrimonial mistakes, his counsel addressed the court, dilating upon the cunning way in which women drew men into matrimony, and the wondrous change that came over them when the victim was ensnared; finishing up by contending that his client could not be held a responsible agent after being galled by such Xantippes for ten years. This skilful "touch of nature" was sufficient for the judge, whose charge ended thus: "This court has had a certain amount of matrimonial experience with one female, and such experience has not been altogether of a satisfactory character. But here is a man who has been so blind, imbecile, and idiotic as to marry in ten years six horrible scolds and shrews. For so doing I class him as a natural fool: and even if he possessed any intelligence, the dwelling with these women must have destroyed it. The plea of the counsel for the defence is sound in law and equity, and I charge you to bring in a verdict of acquittal." The jury did as they were bid. A tax collector at Naples ran away with a large sum of public money, was caught, brought back, and put upon his trial. His counsel admitted the facts, but contended that the collector was one of the people, the money was the people's money, and it would be monstrous to convict a man of stealing what was his own: and the jury being of the same mind acquitted the thief. A barrister retained to defend an unhappy man charged with purloining a duck, found himself embarrassed in consequence of the rogue having exercised his invention over freely, and having volunteered several explanations of the matter. First, he said he did not steal the duck—he had found it; then he said somebody had given him the duck; then that his dog had picked it up; and lastly, that a malicious policeman had put the duck in his pocket unknown to him. Putting the case to the jury, his counsel left the gentlemen to take their choice, saying: "My unfortunate client has told half a dozen different stories as to how he became possessed of the duck. I don't ask you to believe all these stories, but I will ask you to take any one of them." Which story they took the advocate never knew, but the man got off. One plea, if it is a good one, is quite enough, and in certain

cases there is none so good as infancy. The law is very tender of "infants," going great lengths to protect them against themselves. A woman was arrested in Pressburg, Hungary, for receiving stolen goods. She was by birth a Jewess; but six months previous to her detection had been baptized into the Roman Catholic Church. When put upon her trial she pleaded that she was an infant, and could not therefore be held responsible for what she had done—the date of birth in Hungary running according to the date of baptism; and after serious cogitation, the tribunal decided the defence a good one, and that she, a woman of forty, was legally but six months old.—*Green Bag.*

DEFINITION OF "ATTEMPT."—We find our taste for definitions and our fondness for animals gratified in *Reg.* v. *Brown*, 24 Q.B.D., 357, where Lord Coleridge, C.J., Pollock, B., and Field, Manisty, Cave, Day, and Grantham, JJ., sat upon the grave question whether a duck is an animal. We rejoice to find our impression of some years' standing confirmed by the decision of the court that a duck *is* an animal. This speaks well for the judgment of the judges, for, according to the senior Mr. Weller, "the man as can form a ackerate judgment of a animal, can form a ackerate judgment of anythin'." The more important question, however, was as to the definition of an "attempt." The conviction was of an attempt to commit an unnatural offence with domestic fowls, including, we infer, a duck, and the point was raised, that as the offence was impossible of commission, there could be no "attempt" to commit it. In other words, that there can be no attempt to do the impossible. The court unanimously denied that reasoning, disapproving *Regina* v. *Collins* and *Regina* v. *Dodd*, in which it was held that where one put his hand into another person's empty pocket he could not be convicted of an attempt to steal. This accords with our views, and two American cases—*Com.* v. *McDonald*, 5 Cush., 365, and *People* v. *Jones*, 46 Mich., 441—hold precisely the same doctrine: and *Rogers* v. *Com.*, 5 S. & R., 462; *State* v. *Wilson*, 30 Conn., 500; *Kunkle* v. *State*, 32 Ind., 520; *Hamilton* v. *State*, 36 id., 280; *State* v. *Beal*, 37 Ohio St., 108, hold the like doctrine in respect to acts *with intent* to do a particular thing. Mr. Bishop is of the same opinion. But the Supreme Court of this State, in *People* v. *Moran*, 54 Hun., 279, hold the contrary of an attempt to pick a pocket which was empty, Van Brunt, C.J., and Barrett, J., being of that opinion, but Daniels, J., dissenting. The court had not the last English case before them. Judge Barrett distinguishes between "attempt" and "intent"—"an act done with a particular intent and an attempt to commit a specific offence," and he is "surprised at Mr. Bishop's difficulty in reconciling the cases. Mr. Jerome's illustrations are apt and plausible, but hardly convincing. I agree that if we throw a stone at a piece of plate-glass, and fail to break it because the glass was too strong, there is an attempt to break plate-glass. The act tended to break it, and failed. If, however, the stone were thrown at what appeared to be plate-glass, but was not, the wrong-doer might be guilty of throwing with intent to break plate-glass, but no matter what was in his mind, he could not be guilty of an attempt to break anything save the shining object

which he mistook for glass. So as to the scare-crow illustration, a man does not in a legal sense attempt to commit murder, when passing through a field in the dusk, he shoots at a dummy, believing it to be his enemy. He shoots with intent to kill his enemy, but that is not the crime of an attempt to commit murder." This seems to us too fine, although it is very ingenious. Suppose that a man wrongfully shoots at another man, and hits him, but the latter is clad in underwear of impenetrable steel. Will Judge Barrett tell us that there is no attempt to commit murder? To attempt means to try, and that is all there is of the dispute. There is no distinction in law, or logic, or usage, between "attempt" and "intent." A man may "attempt" to jump over a fence ten feet high, although it is impossible, and his endeavour is not simply an "intent to attempt" to jump over the fence. The intent is involved in the attempt. The matter is reduced to absolute common sense in the Rogers case, where it is said: "The intention of the person was to pick the pocket of Earle of whatever he found in it, and although there might be nothing in the pocket, the intention to steal is the same." For "intention" read "attempt," and the law and sense are just as good. And forcibly and more elaborately the same idea is expressed in *Com.* v. *Jacobs*, 9 Allen, 274: "Whenever the law makes one step toward the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance." Judge Barrett is right in saying that "an attempt to commit larceny necessarily contemplates an act tending to effect the felonious *taking of specific property*." He is wrong, we think, in supposing that the specific property must be present so that it can be taken. Suppose it were a pocket-book, and the pickpocket got hold of it, but could not remove it because it was firmly fastened to the bottom of the pocket. Would there not still have been an attempt to take it? This case is not different from the case of the empty pocket. Bishop says, very exquisitely: "The means must be adapted to the end, but the adaptation need only be apparent."—*Albany Law Journal.*

DANGER DEEMED A "DEFECT" IN THE CONDITION OF MACHINERY.—Does danger constitute a defect in the condition of a machine, within the meaning of section 1, sub-section 1, of the Employers' Liability Act? No doubt to attempt to define what "defect" is in the abstract would be to attempt an impossibility, and it would be hardly less difficult to define every possible thing which might come within the meaning of the word "defect"; but *Morgan* v. *Hutchins*, reported in this month's number of the *Law Journal*, lays down a principle sufficiently broad to cover, at all events, the narrower question in reference to danger—a principle, too, that will be found susceptible of very extensive and general application. That important case came before Lord Coleridge, C.J., and Lord Esher, M.R., on a County Court appeal, under those circumstances:

An action had been brought under the Employers' Liability Act by the plaintiff, a boy of thirteen, against the defendants, for damages for the crushing of one of his hands in a leather-pressing machine. The County Court Judge directed the jury to consider whether, in the first place, the boy was using the machine in the performance of his duty; and in the second, whether there was a defect in the machinery in not fencing it or covering the cogs. The jury found a verdict for the plaintiff for £195. From the facts proved at the trial it appeared that the machine in question consisted of rollers which were put in motion by cog-wheels at the side. The boy's duty was to feed the machine with leather, and to keep the leather straight as it passed between the rollers through the machine. The boy was put to the work after merely being told by another boy how to do it. Upon the day of the accident the leather became twisted in some way, and the boy, in endeavouring to straighten it, got his hand entangled in the cogs of the wheel at the side of the machine, and it was crushed. The wheel and cogs were not so fenced by wire-guard or otherwise as to render such an accident impossible, nor were they in any way covered or protected. An inspector of factories had, in 1885, warned the defendants against employing young persons to work the machine, for if the cogs of the wheel were not protected it was dangerous even to adults.

The contention on behalf of the appellant was, that the defect, for the purposes of the Act, must be a defect which prevents the machine doing properly the work it is required to do, that defect must apply to the machine itself, and so that danger was not a defect if the machine here in question was not otherwise defective for the purpose of rolling leather. What was the alleged defect? A part of the machine was wanting—that is, a fence to the cog-wheels; but, then, that would not have made it a better machine for pressing leather—so that, on the facts, the question was distinctly raised as to whether, however dangerous a machine may be, it can be defective if it is not defective for the purposes for which it is used. For instance, contended the plaintiff, a machine may be defective in the hands of a boy when it is not defective in the hands of a man; but, without necessarily going that length, the fact that here the machine could not perform its work without human skill and labour was, of itself, something that had to do with the "condition" of the machine. As Lord Esher put it: If its condition be such that the workman cannot do his part with safety, is that, or is it not, a defect in the condition of a machine the working of which is a necessary performance? However, no authority precisely in point was cited. *Heske* v. *Samuelson & Co.* (12 Q.B.D., 30) was rather the case of the misapplication of a perfect machine, defective in this, that all lifts for coke ought to have something in the way of a guard or fence to prevent the coke falling out; but, in a measure, the court there decided the principle which the court here were called on to lay down definitely. While, again, in *Walsh* v. *Whiteley* (21 Q.B.D., 37) it would rather seem to have been assumed that if the machine were dangerous to a workman, without any fault of his own, it came within the Act, the only doubt that existed in the minds of the two Lords Justices, who differed from the learned Master of the Rolls, being as to whether the defect had arisen from the

negligence of the employer. In *Morgan* v. *Hutchins*, however, a distinct and unqualified enunciation on the subject has been delivered. "The governing principle, in my opinion," said Lord Coleridge, "is that when a machine is defective with reference to a danger, and such defect is within the knowledge of the employer, he is then liable."

And "within the knowledge of the employer," it must be, no doubt; for, though the sub-section says nothing as to this qualification, it should be remembered that *Walsh* v. *Whiteley* (*ubi supra*) decides that the sub-section must be read together with sub-section 1 of section 2, thereby adding the words "owing to the negligence of the employer, or of some person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition." The court here, however, were not pressed by that decision, as the danger was clearly traceable to the employer, and indeed it was not suggested that it was not well within the defendant's knowledge. So that the learned Master of the Rolls was abundantly justified in observing, "it seems to me that unless we hold the defect complained of here to be one within the sub-section in question, the Act might as well never have been passed"—an Act passed with the intention of remedying the strictness of the common law on this subject, holding that the workman ran the risk, and could not recover for a defect in plant not known to him, though known to the employer.—*The Irish Law Times.*

Reviews and Notices of Books.

The Doctor in Canada—His Whereabouts, and the Laws which Govern Him.—A Ready Book of Reference. By Robert Wynyard Powell, M.D., Ottawa. Montreal: *Gazette* Printing Co., 1890.

This is a useful book of reference. It gives in Part I. all the legislation in the Dominion and various Provinces in reference to matters pertaining to the medical profession. Part II. deals with sanitary legislation. Part III. gives Licensing Bodies and Teaching Faculties of various Institutions in the different Provinces. Part IV. gives the medical appointments in the Hospitals, Asylums, etc. Part V. gives a list of medical journals. The remaining pages of the book contain lists of various officers and others connected with medical lines in various Provinces.

DIARY FOR JUNE.

1. Sun....*Trinity Sunday.*
4. Wed...Lord Eldon born 1751.
5. Thu....Battle of Stoney Creek, 1813.
7. Sat.....Easter Term ends.
8. Sun....*First Sunday after Trinity.*
9. Mon...County Court Sittings for Motions in York. Surrogate Court Sittings.
10. Tues...General Sessions and County Court Sittings for trial except in York.
11. Wed...St. Barnabas. Lord Stanley Gov.-Gen., 1888.
14. Sat.....County Court Sittings for Motions in York end. Magna Charta signed, 1215.
15. Sun....*Second Sunday after Trinity.*
16. Mon...Battle of Quatre Bras, 1815.
18. Wed...Battle of Waterloo, 1815.
19. Thu....Battle of Blenheim, 1704.
20. Fri.....Accession of Queen Victoria, 1837.
21. Sat. ..Longest day.
22. Sun....*Third Sunday after Trinity.* Slavery declared contrary to the laws of England, 1772.
24. Tues...Midsummer Day. St. John Baptist.
25. Wed...Sir M. C. Cameron died 1887.
28. Sat.....Coronation of Queen Victoria, 1838.
29. Sun....*Fourth Sunday after Trinity.* St. Peter.
30. Mon...Jesuits expelled from France, 1880.

Reports.

HIGH COURT OF JUSTICE, ONTARIO.

RE CENTRAL BANK. NORTH AMERICAN LIFE INSURANCE CO.'S CASE.

Banking and company law—Purchase or pledge of bank shares—Limitation of a company's powers in respect thereof—Ultra vires—Loan to a bank on its shares—Liability of the loaning company under the Bank Act—Winding-Up Act, R.S.C., c. 129.

It is not only a canon of English municipal law, but a principle of universal law, which must be taken, in the absence of proof to the contrary, to be a part of every system of jurisprudence, that the governing body of a trading corporation cannot in general use the funds of its community for any purpose other than those purposes for which they were contributed or authorized to be used.

The capacities and powers of trading and other companies are limited in degree according to the purposes of such companies, and the measure of a company's liability in respect of its contracts must be co-extensive with its power to make them.

The charter incorporating a company creates a contract between the company and its shareholders, and any act of the directors or company not within its express or implied powers would be a breach of such contract, and therefore *ultra vires*.

When a company has no power under its charter to become the owner of bank shares, or to acquire any other title than that of pledgee, such a company, in winding-up procedings, cannot be treated as an ordinary holder or purchaser of such shares, so as to be subject to the double liability clause of the Bank Act.

Where any application of the funds of a company to a purpose not within its charter would be restrained by injunction at the suit of a shareholder, the court cannot declare such company's funds liable therefor, as such a declaration would be giving judicial sanction to a breach of trust, or to an act *ultra vires* of the company.

Where a company having authority to borrow money from other companies or individuals pledges its own shares as a security for a loan, the company making the loan thereon to the borrowing company cannot be made a contributory in the proceedings for the winding up of such borrowing company.

Therefore, where an insurance company loaned money to a bank and took as security for such loan a transfer of certain shares of the bank, which loan was repaid before the insolvency of the bank, and the shares though re-transferred by the insurance company were not accepted on the books of the bank, as required by the Bank Act, the insurance company, on the winding up of the bank, was held not to be a contributory in respect of such shares.

[May 14, 1890.

This was an application in the winding-up proceedings of the above bank against the above insurance company on the facts stated in the judgment. The case was argued before the Master on the 25th and 26th of April, 1890.

W. R. Meredith, Q.C., for the liquidators.

J. K. Kerr, Q.C., for the Insurance Company.

MR. HODGINS, Q.C., MASTER-IN-ORDINARY.—In these winding-up proceedings an application is made by the liquidators of the Central Bank to have the above insurance company placed on the list of contributories in respect of 135 shares of the capital stock of the bank, and to be held liable to pay the sum of $13,500, being the amount of the double liability imposed on shareholders by s. 77 of the Bank Act.

The evidence establishes that on the 27th July, 1887, the Central Bank obtained a loan of $12,000 from this insurance company through a firm of brokers in Toronto, on the security of a transfer of 135 shares in the capital stock of the bank. The transfer book of the Central Bank shows that on that day Mr. Allen, the cashier, but in his own name, purported to transfer 135 shares to the firm of brokers, who in like manner purported to assign them to the insurance company, whose manager appears to have duly accepted the shares. Interest on the loan was paid by the bank to the company, and charged against the interest account in the bank books. On the 27th September, 1887, the loan was repaid by the bank, and the company, through their Vice-President, purported to re-assign the 135 shares in blank, but by a marginal order they made the transfer subject to the order of A. A. Allen, cashier in trust. The transfer of these 135 shares was never accepted so as to divest the insurance company of their title and vest it in another holder, as required by the Bank Act, and hence the application by

the liquidators to enforce against this company the double liability of $13,500 in respect of these shares.

The application is resisted on several grounds, but it is only necessary for the purposes of the present application to consider those relating to (1) the power of this insurance company to acquire an absolute title to bank shares, and to (2) the liability of the company in respect of the shares assigned to them as a security for the loan to the Central Bank.

The Act under which this insurance company is incorporated (42 Vict., c. 73 D.) authorizes it to invest its funds, *inter alia*, in only one of the recognized modes of dealing with bank shares, viz., as mortgagee or pledgee, the words being "on the security of bank stock," and the charter provides that such loans are to be made "on such terms and conditions, and in such manner and at such times, and for such sums, and in such sums of repayment, whether of principal or interest or principal and interest together, and at such interest and return as the Board of Directors may from time to time determine and direct."

It has been clearly established by a long series of decisions that not only are the capacities and powers of trading and other corporations limited in degree, but so are also the purposes and ends for which such corporations are authorized to employ such capacities and powers. The charter incorporating a company creates a contract between the company and its shareholders, and any act of the directors or company not within its express or implied powers would be a breach of such contract, and therefore *ultra vires*.

The charter granted to this company defines and limits its powers and its purposes in such a way as to compel a consideration of what may be formulated as a canon of corporation law: that the measure of the company's liability under a contract respecting these shares must be co-extensive with its power to acquire them.

The doctrine thus tersely stated has been recognized as having a more universal application in the case of *Pickering* v. *Stephenson*, L. R. 14 Eq., 322, where, though the special powers and purposes of a corporation had to be construed according to a foreign law, the Court held that it was not only a canon of English municipal law, but a great and broad principle of universal law, which must be taken in absence of proof to the contrary, to be a part of every system of jurisprudence, that the governing body of a corporation organized as a trading partnership cannot in general use the funds of its community for any purpose other than those purposes for which they were contributed, or authorized to be used.

Were there no decisions to illustrate the application of this canon of corporation law, its cogency might command deference to its fiat. But the light of authority seems so clear that no reasonable doubt can exist as to its applicability to the case before me.

In *Coleman* v. *Eastern Counties R. Co.*, 10 Beav., 1, Lord LANGDALE, M.R., held that the powers given by an Act of Parliament to a corporation cannot be construed to extend further than is expressly stated in the Act. And in *Salomons* v. *Lang*, 12 Beav., 339, s.c. 14, Jurist 279, the same learned judge held that directors could not lawfully apply the moneys of their company in the purchase of shares in another company unless authorized to do so by Act of Parliament, nor could they apply such moneys for any other purpose whatsoever than those directed and authorized by Parliament; and that if any directors should seek to involve their company or shareholders in liabilities not so authorized, it would be the duty of the court to enjoin them by injunction.

In *Dobinson* v. *Hawks*, 16 Sim., 407, a trading company, in order to obtain a loan from a benefit building society, became shareholders in the society, and gave a mortgage in the ordinary form. It was contended that the company was not entitled to redeem the mortgage, without regard to the liability which they had incurred as such shareholders, but the court held that the subscribing for such shares was illegal, and that the trading company could not be made subject to the liabilities of shareholders.

The case of *Joint Stock Discount Company* v. *Brown*, L.R., 3 Eq., 139, and 8 Eq., 381, seems to further illustrate the doctrine I have referred to. The company was incorporated for the purpose, among other things, of "making advances and procuring loans on and investing in securities." The directors applied some of the company's funds for the purchase of shares in a banking company, but both Lord HATHERLY and Sir W. M. JAMES held that such a purchase was not an "investment in securities" authorized by its articles, and was therefore *ultra vires*.

In the last edition of "Brice on *Ultra Vires*" it is stated that "in the United States it is quite settled that corporations cannot purchase or hold or deal in stocks of other corporations, unless expressly authorized to do so by law" (p. 175.)

In the same jurisprudence it has been affirmed that parties dealing with corporations are bound to know the law governing them; and that therefore a party dealing with a corporation with limited powers, must be presumed to know the scope and restrictions upon its powers and purposes as granted and defined by the charter of its incorporation: *Connecticut Mutual Life Insurance Company* v. *Cleveland, etc., R.R. Co.*, 41 Barb. N.Y., 9; *Merritt* v. *Lambert*, 1 Hoff. N.Y., 166.

But the decision of the present Chief Justice of the Superior Court of Quebec on a clause in the Savings Bank Act (R.S.C., c. 122, s. 20), which has some analogy to the clause which I have cited from this insurance company's charter, and is so much within the policy of the canon of corporation law I have referred to, that I have no hesitation in applying it to the case before me. Under a power conferred upon savings banks to loan their moneys on personal security, taking as collateral thereto "stock of some chartered bank in Canada," a savings bank acquired 307 shares in the capital stock of the Exchange Bank as collateral security for loans made to several outside parties. On the winding up of the Exchange Bank, the liquidators sought to make the savings bank liable in respect of the 307 shares standing in its name in the books of the bank; but the court held that the savings bank could not acquire or hold such shares except as pledgees, and could not become the owner of such shares within the meaning of the Bank Act, and was not therefore subject to the double liability imposed by that Act: *Exchange Bank* v. *Montreal City and District Savings Bank*, 2 Montreal L.R., 57. This judgment was afterwards affirmed on appeal to the Quebec Court of Queen's Bench on the 27th September, 1887. The case of *Railway, etc., Advertising Co.* v. *Molson's Bank*, 2 Leg. News, 207, is to the same effect.

It seems, therefore, that this company had no power under its charter to become the purchaser or owner of bank shares; and it follows that any application of its funds to such a purpose, or any purpose not allowed by its charter, would be restrained by injunction at the instance of a shareholder. And were I to declare the company subject to a liability not warranted by its charter, I would be giving a judicial sanction to a breach of trust, or to an act *ultra vires* of the company's powers.

This might suffice for the disposal of the application before me; but as I find on the evidence that the loan was for the benefit of the Central Bank, there is another series of cases applicable to that finding.

In the *South Eastern R. Co.'s case*, L.R. 14 Eq. 10, an hotel company borrowed money from the railway company upon the security of unissued shares, which were placed in the names of trustees. The hotel company was afterwards wound up, but it was held that the railway company was not to be treated as contributories but as creditors, and to be entitled to prove for the amount of their loan.

The principle of this decision has been affirmed by the House of Lords in *Beattie* v. *Lord Ebury*, L.R. 7 H.L. 10. In that case unissued preference shares of a company had been assigned to their bankers as collateral security for advances made on the company's cheques. On the winding up of the company the bankers had been placed on the list of contributories in respect of such shares, but the House directed the names of the bankers to be struck off the list, and stayed the order dismissing the appeal until the names were so struck off.

The *ratio decidendi* of these cases may be illustrated by a consideration of the rights which would have to be adjusted if it were conceded that the Central Bank had authority to borrow money from other corporations or individuals on its unissued shares, and to transfer such pledged shares to a trustee to hold as security for the loan. Such trustee on the winding up of the Central Bank might have been found on the register of shareholders, and therefore liable to be placed on the list of contributories; but on the authority of *Re National Financial Co., Ex parte Oriental Commercial Bank*, L.R. 3 Ch. 791, such trustees would, if so placed on the list, be entitled to be indemnified against all calls in respect of such shares, on the ground that a trustee is entitled to be recouped by his *cestui que trust* for any payments made by him on account of the trust estate.

The application of the liquidators must therefore be refused.

The Bank Act (s. 29) provides that no assignment or transfer of shares "shall be valid unless it is made and registered and accepted in a book or books kept by the directors for that purpose." The non-observance of these conditions by the company left its name on an incompleted and unaccepted transfer of shares, and gave rise to this litigation, and the liquidators in executing their duties under the Winding-Up Act could not determine the mixed questions of law and fact themselves, and had no other course open to them but to bring the case before the court for its adjudication. There will therefore be no costs.

SUPREME COURT OF BRITISH COLUMBIA.

WEILER *v.* RICHARDS.

Provincial legislation—Ultra vires—Licenses.

Where an Act of the Legislature of the Province of British Columbia empowered the municipalities within the Province to impose a license tax upon all persons carrying on business as wholesale or retail merchants:

***Held*, that the Act was *intra vires* of the Legislature of the Province.**

This was an appeal against a conviction of the Stipendary Magistrate of Victoria, for that the Appellant carried on the business of a wholesale as well as retail merchant without having taken out a license as provided by the by-law under the Municipalities Act and Provincial Statutes.

BEGBIE, C.J.—The facts being all admitted the only question argued before me was as to the constitutionality of the tax, *i.e.*, of the Provincial Statute which authorised it to be imposed. It is admitted that if the Provincial Legislature has this authority under s. 92 of the B.N.A. Act the tax has been in other respects lawfully imposed on the appellant.

Several cases were cited on both sides, for and against the tax, but the appellant's counsel almost rested his claim upon *Severn's Case*, 2 S.C.R., 70. Of course both duty and inclination would impel me to follow a decision of the highest Court of Appeal in Canada if the circumstances of the taxes are identical or even analogous; it is my clear duty to follow such decisions, and it would render all debate unnecessary and relieve from all responsibility in discussing so delicate a question as to the constitutionality of an Act of the Legislature.

Unfortunately, however, the two cases at the very outside are separated by a very broad and clear distinction owing to the differences in the trades of the two parties. The present appellant is an upholsterer; Severn was a brewer in Ontario subject to the Dominion excise laws and armed with a Dominion permit. And this is relied upon by all the judges who decided that the additional license tax was beyond the power of the Provincial Legislature. All matters connected with the excise are admittedly under Dominion law. Severn had already been duly licensed to exercise his calling, as far as manufacturing beer was concerned; and it was argued almost irresistibly that this involved a license to sell his beer when manufactured. It was not to be presumed that the B.N.A. Act contemplated a double taxation; and besides taxation by the Province would necessarily diminish the capacity of the taxee to sustain the excise taxes, which the Dominion might find it necessary to impose. All the four judges who formed the majority on Severn's case rely strongly on this ground. They allege other grounds also, but they all agree in this and place it prominently forward, and it is not easy to see an answer to it. Another matter which is also prominently put forward is the argument of *ejusdem generis*. The two clauses in s. 91 and s. 92, which are alleged to be in conflict, and on which the appellants and the municipality respectively rely are in well known words. Sec. 91, s-s. 2, declares that the Dominion Parliament exclusively is authorized to make laws "for the regulation of trade and commerce." Sec. 92, s-s. 9, declares that the Provincial Legislature exclusively shall have authority to make laws "in relation to shop, saloon, tavern, auctioneer and other licenses for raising revenue for provincial, local, or municipal purposes." It was argued by the majority in Severn's case that the words "other licenses" must mean others *ejusdem generis*, and that "shop licenses" in Ontario (being the province in which the tax appealed against was imposed), did not mean licenses for shops in the wide, general sense, but only for liquor shops, and that other licenses must, therefore, also mean other liquor licenses, though the auctioneer's license was not so readily dealt with. But, whatever the effect of this last word "auction-

eer" may be, the phrase "shop license" never had in British Columbia before Confederation the sense which it appears to have borne in Ontario. And all ordinary retail or wholesale trades of any description have long before Confederation been handed over to municipalities to be taxed and at discriminating amounts, as early at least as the Victoria Municipal Act, 1867. So that the agreement of the majority of the judges in the Severn case that the Imperial statute intended to retain to every corporation, after Confederation, the same and no other sources of municipal and local revenue, as it possessed before the Confederation, would lead in the present case to a conclusion as to the legality of the taxation exactly contrary to that which the same principles led to in the Severn case. That case is, no doubt, conclusive in favor of exempting a brewer in Ontario, but the principles there enunciated militate against the exemption of an upholsterer in British Columbia.

But in fact all the early decisions of all the courts must be read with attention to the later decisions of the Privy Council. And the Judicial Committee themselves observe (*Lambe's Case*, 12 App. Cas., 586): "Since *Severn's Case* was decided, the question has been more completely sifted before the committee in *Parson's Case*, 7 App. Cas., 96, and it was found absolutely necessary that the literal meaning of the words should be restricted in order to afford scope for the powers which are given to the provincial parliament." Lambe's case is itself an example of the results of this "sifting," for in it a provincial tax on banks was maintained, whereas in Severn's case the notion of a tax on banks was suggested by one of the majority of the judges as being too monstrous to be entertained, but yet as being logically correct, if the province could tax Severn.

I am left, therefore, to apply these later cases; extracting from them their principles and acting on them; examining also the principles of the B.N.A. Act, s. 91 and s. 92.

Now, no case has been cited in which sufficient weight seems to me to have been expressly given to the words actually used in the two subsections I have quoted. In particular, s. 92, s-s. 2, has been treated in argument both here and elsewhere, as if it drew under the power of the Dominion Parliament, and, therefore, withdrew from the Provincial Parliament all matters connected with trade and commerce. But that is not so; but only the regulation of trade and commerce. Whether only external or internal trade is meant, or whether this power extends to the regulation of the manner in which, and the times at which, all persons in the Dominion, and in every province and municipality thereof, may try and get their living by buying and selling, it is unnecessary here to enquire. The by-law does not seek to regulate trade, but only to tax it. Regulation and taxation very often go together, as is easily seen in the instances of customs and excise and licensed victuallers. But they are essentially different. The Dominion Parliament regulates insurance companies and banks; but it does not tax them. On the contrary, the province does not attempt to regulate them, but it does tax them, and in Parson's case and Lambe's case the Judicial Committee have decided that this power is lawfully claimed by the province.

And although the Imperial Parliament, when it regulates any trade or industry, does also very often proceed also to tax it (not so much for the purpose of revenue as to provide for the expenses of regulation), yet it is obvious that the two things are entirely distinct, and may, and often are, relegated to different bodies. Parliament is universally sovereign, and has all the powers of either the Dominion or Provincial legislation. And so the Imperial Parliament may both regulate and tax trade; but it often imposes a tax, or, what is the same thing, authorizes the demanding of fees, etc., in respect of any trade, and relegates the whole or the greater part of the regulation of such trade or occupation to the board of trade, or of health, the charity commissioners, etc., who have no power to impose taxes. There does not appear, therefore, to be necessarily any conflict between these two sub-sections. The B.N.A. Act seems to provide that the Dominion Legislature exclusively shall possess one of the functions of the Imperial, viz., regulation; and the Provincial Legislature is, so far as local revenue is concerned, to have exclusive power over the other function, viz., taxation by license fees. But neither the by-law nor the statute now impugned profess to regulate the appellant's trade, nor have, so far as I can see, any tendency to do so. And I am unable to see in this case any conflict or overlapping of jurisdiction. In practice the distinction between regulation and taxation

appears to have been often followed. Thus the Dominion Legislature regulated, and not taxed, banks and insurance companies, and their right to do so has been established in Lambe's case and Parson's case before the Privy Council. The Imperial Parliament in many cases, *e.g.*, shipping, factories, etc., regulates without taxing, and in many other cases taxes certain transactions without regulating how or where, or by whom or with what ceremonies those transactions are to be performed, or any regulations except those connected with the actual perception of the tax. I have already alluded to the *ejusdem generis* argument. The question almost immediately arises, "*eujusdem generis?*" These other licenses are to be of the same genus as that indicated by the previous particular words. Well, what is that genus? and here really the particular words cover every kind of trade. I prefer Justice Strong's meaning of the word shop—the general popular sense—as the proper sense in an Act of Parliament, and that is the sense which it has always borne here.

I could not listen to the suggestion that because "shop license" in Ontario was commonly applied to a license to a grocer to sell fermented liquors, therefore, it must necessarily, or ought reasonably, to bear that sole meaning here, where it never has been so confined.

It would be difficult to argue that in British Columbia the term "other license" would not cover an upholstery, and the argument of Mr. Justice Strong at p. 107 seems quite unanswerable. But for the purpose of this appeal it becomes quite immaterial to consider what is or what is not the "other license" phrase. It is not any "other" or undesignated license that is here taxed, but one of the licenses expressly designated in s-s. 9, viz., a "shop" license. It is admitted that the appellant keeps a shop, a place where he makes his living by buying and selling. Severn did not keep a shop in the ordinary sense of the word. He manufactured and sold beer. The only words under which he could be taxed, therefore, were "other licenses."

For these reasons I think that the tax is quite constitutional, and that the appeal should be dismissed, and with costs. I think that any other conclusion would be quite inconsistent with the judgments in Parson's case, and Lambe's case, and with the principles, though not with the decision, enunciated by all the judges in Severn's case.

S. Perry Mills for appellant.

W. J. Taylor for the respondents.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

COURT OF APPEAL.

From MACMAHON, J.] [May 13.

SHAIRP *v.* LAKEFIELD LUMBER CO.

Free grants—Crown timber—Timber license—Trespass — Patent — Reservation — R.S.O. (1887), c. 25, ss. 4, 10—R.S.O. (1887), c. 28.

The plaintiff was in March, 1884, located as the purchaser of a lot in the township of Burleigh, and obtained a patent therefor in November, 1888, the patent being in the usual form of a patent in fee to a purchaser, without any reservation of timber or any reference to the Free Grants and Homesteads Act. The defendants assuming to act under a timber license issued in May, 1888, covering this and other lots, entered upon the lot after the issue of the patent and took timber therefrom. In the license the lot was referred to as "located and sold." The Township of Burleigh was within the geographical limits described in sec. 4 of the Free Grants and Homesteads Act, R.S.O. (1887), c. 25, but had never been appropriated or set apart as free grant lands under the provisions of that Act.

Held, that the lot was not "land located or sold" within the limits of the Free Grant Territory, within the meaning of that Act, and that the patent was not subject to the reservations as to timber in that Act contained.

The expression "Free Grant Territory" in sec. 10 does not refer to the whole territory or tract defined in sec. 4, but only to that portion of that territory or tract which may be actually set apart and appropriated by the Lieutenant-Governor-in-Council under the Act.

Held, further, that there being no actual reservation in the patent, the defendants had no

right to cut the timber after the issue of the patent, and were liable in damages.

Judgment of MACMAHON, J., affirmed.

Poussette, Q.C., and *Aylesworth* for the appellants.

Watson, Q.C., and *E. B. Edwards* for the respondent.

Co. Ct. of Elgin.] [May 13.

PECKHAM *v.* DEPOTTY.

Contract—Master and servant—Parent and child.

The plaintiff, while a child of very tender years, had been placed by her father with the defendant, who was not a relation, to remain with him until she attained eighteen years of age, he agreeing to support her during that time, to send her to school, to supply her with clothing and to give her certain articles when she reached the age of eighteen. She remained with the defendant until she was nearly twenty years of age, being in all respects treated as a member of the family, and doing such work as a member of the family would naturally do.

Held, that the plaintiff had no implied right to remuneration for services rendered after she attained the age of eighteen, and that in the absence of any express agreement for payment of wages she could not recover.

Judgment of the County Court of Elgin reversed.

Aylesworth for the appellant.

J. S. Robertson for the respondent.

From C.P.D.] [May 13.

LIVINGSTONE *v.* THE TEMPERANCE COLONIZATION SOCIETY.

Company—Shareholder—Calls—Surrender of shares—Cancellation of shares—Compromise—Invalid resolution.

A trading corporation has authority as an incident of its existence to compromise all *bona fide* claims made against it, and therefore has power to compromise claims made by a shareholder to be relieved of his shares, either by reason of fraud or misrepresentation or any other cause which would enable the court to decree such relief; but as the court, if a shareholder were to make a claim against the corporation for compensation in damages in respect of some matter not connected in any way with the validity of the shares held by him, could not decree a cancellation *pro tanto* of those shares, so the corporation itself cannot validly compromise a claim for damages against it by accepting the surrender of, and by cancelling, shares of its capital stock held by the claimant.

Judgment of the Common Pleas Division reversed.

Moss, Q.C., and *W. Barwick* for the appellants.

The respondent Livingstone in person.

From Q.B.D.] [May 26.

MENDELSSOHN PIANO CO. *v.* GRAHAM AND WEST.

Partnership—Loan—Debtor and creditor—Sharing profits.

This was an appeal by the plaintiffs from the judgment of the Queen's Bench Division, reported 19 O.R., 83, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 23rd of May, 1890.

The Court dismissed the appeal with costs, agreeing with the conclusions arrived at in the Court below.

R. S. Neville for the appellants.

E. Coatsworth, jr., for the respondent West.

Queen's Bench Division.

MACMAHON, J.] [May 17.

REGINA *v.* CREIGHTON.

Criminal law—Pleading—Libel—Justification—Particulars—Motion to quash plea—R.S. C., c. 174, s. 2, s-s. (c); s. 143.

To an indictment for libel the defendant pleaded that the words and statements complained of in the indictment were true in substance and in fact, and that it was for the public benefit that the matters charged in the alleged libel should be published by him.

Held, that the plea was insufficient because it did not set out the particular facts upon which the defendant intended to rely; and that the omission from 37 Vict., c. 38, s. 5 (R.S.C., c. 163, s. 4), of the words "in the manner required in pleading a justification in an action for defamation," which were contained in C.S.U.C. 103, s. 9, had not the effect of altering the rule.

Held, also, that this was a case in which the court should, in the exercise of its discretion, quash the plea upon a summary motion, without requiring a demurrer, a course permitted by s. 143 of R.S.C., c. 174, as interpreted by s. 2, s-s. (c).

S. H. Blake, Q.C., *Osler*, Q.C., and *Marsh*, Q.C., for the prosecutors.

Ritchie, Q.C., *Laidlaw*, Q.C., and *Cassels* for defendant.

FALCONBRIDGE, J.] [April 26.

BRENNEN *v.* BRENNEN.

Husband and wife—Action by wife against husband's relatives—False representations and conspiracy to bring about marriage—Want of precedent—Public policy.

Action by a married woman against the father, mother, and brother of her husband, and for false representations made to her before marriage, as to the character and financial standing of her husband, and for entering into a fraudulent conspiracy to induce the plaintiff to enter into the marriage contract.

Held, that the action was not maintainable because without precedent and contrary to public policy.

J. K. Kerr, Q.C., and *Neville* for plaintiff.

McCarthy, Q.C., and *Bicknell* for defendant, M. Brennen.

S. H. Blake, Q.C., for defendant, S. Brennen.

J. A. McCarthy for defendant, H. Brennen.

STREET J.] [May 21.

COUNTY OF MIDDLESEX *v.* SMALLMAN.

Registrar of deeds—Bond for performance of duties of office—Payment to municipality of portion of fees—Liability of sureties—R.S.O., c. 114, ss. 13, 107.

The action was upon a bond executed by the defendants as sureties for a Registrar of Deeds, dated 8th January, 1886, to recover the portion of fees received by the Registrar which he should have paid over to the plaintiffs under R.S.O., c. 114, s. 107.

The bond was in the form prescribed by Schedule A. of the Act, and was conditioned for the performance of the duties of the Registrar's office and against neglect or wilful misconduct in office to the damage of any person or persons.

This form was prescribed before the introduction of the provisions now contained in s. 107, and s. 13 makes special provision for the giving of special security for the payment of moneys under s. 107.

Held, that the bond given by the defendants must be taken to be restricted to the performance by the Registrar of the duties imposed upon him other than the duty imposed by s. 107, and the action was dismissed.

Purdom for plaintiff.

Osler, Q.C., and *Flock*, Q.C., for defendants.

Chancery Division.

ROBERTSON, J.] [May 13.

RE SAUGEEN MUTUAL FIRE INSURANCE CO. KNECHTEL'S CASE.

Mutual Insurance Co.—53 Vict., c. 44, s. 4 (O.) —Retrospective operation.

Appeal from the Master at Guelph.

Held, that 53 Vict., c. 44, s. 4 (O.), substituting a new section for R.S.O. (1887), c. 167, s. 132, is retrospective in its operation, and applies to premium notes given before its passing as well as to those given afterwards.

Kingston, Q.C., for the appellant.

Hoyles, Q.C., contra.

Practice.

C.P. Div'l Ct.] [June 7.

COUNTY OF ESSEX *v.* WRIGHT.

Consolidation of actions—Staying actions—Principal and sureties—Reference—Costs.

Twelve actions brought by a municipality against the different sureties of the municipal treasurer, to recover accounts alleged to have been received by the treasurer and not accounted for, were consolidated and proceedings in them were stayed pending the determination of an action against the treasurer himself to recover the same amounts.

In the action against the treasurer a reference was directed to ascertain what was due from him, and an order was made permitting the sureties to appear upon the reference and contest the claims of the municipality. This order

was varied by making provision for awarding costs as between the municipality and the sureties.

G. T. Blackstock for plaintiffs.

S. H. Blake, Q.C., for defendant.

Wright, *Langton*, and *W. H. Blake* for other defendants.

Law Students' Department.

EXAMINATION BEFORE EASTER TERM: 1890.

CALL.

Equity.

1. State the general principles which, apart from statutory provisions, or any special provisions in the instrument creating the trust, govern Courts of Equity in determining whether or not a purchaser of land is bound to see to the application of the purchase money when buying from the trustee. Is there any statutory provision affecting the same? If so, what?

2. Under what circumstances would a tenant have been able to file a bill of interpleader against his landlord? Reasons.

3. A. is lessee of farm Blackacre. The lease contains a pre-emption clause under which A. can purchase the freehold by giving two months notice before the term expires, and by tendering the sum agreed on. He gives the notice at the required time, but fails to pay the money. The lessor refuses to carry out the contract, and A., the lessee, brings an action for specific performance. Can he succeed? Explain.

4. Distinguish between the effect of conditions in restraint of marriage; (1) where there is a bequest over in default of condition complied with; (2) where there is no bequest over. A father bequeaths a legacy to his daughter to be paid to her at 21 years if she does not marry until that period. She marries at 20 years of age. Will she be entitled to legacy? Explain.

5. A. is the executor of B., he writes to a supposed debtor, C., demanding payment of $1,000. C. pays the money, and A., the executor, distributes the same with other moneys to the legatees under the will. C. subsequently discovers that he had previously paid the debt. Can he recover same from the executor, and if he can, has the executor any remedys. If so, what?

6. A. and B. are about to intermarry, a parol agreement is entered into between them, that A., the intended husband, will settle certain property on his intended wife, B. After marriage a settlement is executed in pursuance of such parol agreement. The husband being indebted at the time, and afterwards becoming insolvent, the creditors seek to have the settlement set aside. Should they succeed? Explain.

7. Distinguish between the relief granted in cases of defective executions of powers. (*a*) Where the same are created by private parties. (*b*) Where they are specially created by statute.

8. A., as executor of the estate of B., is liable as such to certain covenants contained in a lease made to B.—he is about to assign the lease to C.—what steps should he take in order to be able to proceed to distribute the personal estate of B., without any liability to himself? Reasons for answer.

9. A. and B. are joint obligors on a bond to C. The condition on the bond has been broken, and the right of C. to sue thereon becomes absolute. Before action brought B. dies. State C.'s rights, giving reason for your answer.

10. A Guarantee Company enter into bonds for the good conduct and honesty of A., a ledger keeper in the Bank of Toronto. Sometime after, and during the pendency of the bond, A. is promoted to the local management at Guelph. In such capacity he embezzles a considerable sum of money. The bank sues the Guarantee Company who defend the action. Who should succeed, and why?

Contracts—Evidence—Statutes—Honors.

1. A. makes a proposal to B., which B. does not answer until after a delay of some months, and does not then assent to, but some months afterwards does accede to the proposal. How far is this evidence of a contract? Why?

2. A. has a horse to sell. He agrees to let B. have him for $130 if he likes him, and B. is to keep him a month on trial. B. takes him and keeps him for a fortnight. B. then tells A. he is not satisfied. A. then says, "Return the horse." B. keeps him ten days longer, and then returns him. A. refuses to receive the horse, and brings an action for the $130. Should he succeed? Why?

3. A. makes an offer by letter to B. B. answers in such a way that the answer, though

ambiguous, is capable of being construed as an acceptance. A. acts upon the answer as an acceptance. Is he justified in so doing? Why?

4. A negotiation for a compromise is commenced by a letter "without prejudice." Further letters relating to the matter were written, not stated to be without prejudice. The party who writes them objects to these latter letters being used against him. Is he right? Why?

5. A father verbally promises in consideration of his daughter's marriage, to give her a house as a wedding present. Immediately after the marriage he puts the daughter and her husband in possession. The house is not all paid for, and the father dies owing for the house. The daughter and son-in-law claim against the father's estate for the unpaid balance of purchase money. Should they succeed? Why?

6. C. covenants with A., his executors, administrators, and assigns, and to and with B. and his assigns to pay an annuity to A. and his executors during B.'s life. On the death of A., in whom is the right of action? Why?

7. In an action on a breach of covenant for assigning or sub-letting premises without license, what is the measure of damages?

8. Explain fully the limitations of the rule that a witness is not bound to criminate himself.

9. Explain the practice as to the right of summing up the evidence in a case at a Trial.

10. A witness is called, and after answering an immaterial question, his examination is stopped by the Judge. The other party claims the right to cross-examine him. Can he do so? Why?

Criminal and Common Law—Honors.

1. A statute contains a prohibition and a penalty:—Both are contained in one section of the statute; on which must you proceed?

If the prohibition is in one section and the penalty in another, on which can you proceed?

2. How far is the doctrine of a moral insanity, or insanity of the moral feelings while the sense of right and wrong remains recognized in English criminal law?

3. How is a deaf and dumb person to be tried, who is brought up for trial on a capital charge?

4. On an indictment against an accessory, it is proposed to use as evidence against him the confession of the principal. Can this be done? Why?

5. How far is the proprietor of a newspaper criminally liable for the publication of a libel supposing him to have had no part in the publication?

6. By the act of A. an injury is occasioned to the foundations of the house of B., of which B. has not at the time any knowledge, but which afterwards, more than six years from the injurious act, exhibits itself by creating actual mischief to A.'s house. From what time does the Statute of Limitations run? Why?

7. In trespass and assault against two persons, it is asked to sever the damages because the assault is proved to have been committed by one with more violence than the other. Can this be done? Why? What is the proper course?

8. A. and B. are co-sureties. A. verbally promises B. that he will indemnify him. On being sued, he claims that not being in writing, he is not liable. Is he right? Why?

9. When goods are not delivered at the time specified for delivery, what is the measure of damages?

(1) When their place can be supplied in the market?

(2) When their place can not be supplied in the market?

10. A. orders from B. a certain specified patented machine. A. finds that the machine wholly fails to accomplish the purpose for which it was intended, and which it was the expressed object of the patent to effect. On being sued for the price he refuses to pay on those grounds Should he succeed? Why?

Real Property—Honors.

1. A. and B., husband and wife, hold Black acre under a grant from C. A judgment is obtained by a creditor of "A", the husband, against him. *Fi. fa.* lands are taken out. Can the creditor at the expiration of the year proceed to advertise and sell Blackacre? Explain.

2. Where there is an agreement for the sale of farm property, which is silent as to the crops, what are the rights of vendor and purchaser in respect thereof?

3. A testator who died last December, devised his house and lot in Toronto to A.; would you, acting for a purchaser, accept title through A.? Reasons for your answer.

4. A bequest is made to A. of $5,000 to be paid him when he attains the age of twenty-five

years, with the direction that the interest thereon be paid him in the meantime. "A." dies when twenty-one years of age. Who is entitled to the $5,000, and why?

5. When (if at all) is a purchaser bound to disclose to the vendor facts relating to the land which he is about to purchase?

6. Where the vendor's solicitor receives the deposit money under an agreement for the sale of lands, in what capacity does he hold it? Is there any distinction between a solicitor and an auctioneer in such case?

7. A bequest is made by a testator to the children of A., "who survive me." A child is born six months after his death, will such child take any share?

8. Write a short note on testamentary capacity.

9. What statutory provisions are there in respect of the right of a subsequent mortgagee to bring action for arrears of interest in cases where a prior mortgagee has been in possession?

10. "A." attends an auction sale of real estate; he bids on the property and it is knocked down to him for $5,000; before signing the contract he seeks to retract his bid. Can he do so?

Equity—Honors.

1. As between husband and wife, who is entitled to the custody of their infant children? Can this right in any way be affected by the conduct of the parents? Is there any statutory (Provincial) legislation in regard thereto? If so, what?

2. Distinguish between Novation and Subrogation, giving an example of each.

3. A testator bequeathes $10,000 for "promoting charitable purposes, as well of a private as a public nature, and more especially in relieving distressed persons." Is such a good bequest?

4. What classes of persons may institute actions for the administration of a deceased person's estate?

5. Under what, if any, circumstances, will Courts grant relief in the case of an award *(a)* where mistake of a law is alleged, *(b)* where mistake of fact is depended on?

6. Under what circumstances will the Court decree the dissolution of a partnership at the instance of one of the partners when he cannot by his own act dissolve the same?

7. State some cases in which the Court will appoint a receiver. When appointed, what are his rights and duties? Why is such appointment often termed an equitable execution?

8. Under what circumstances will Courts at the present time grant relief in the case of confusion of boundaries?

9. A. is a tailor carrying on business in Toronto, as the York Tailoring Establishment; he sells out the business and good-will to B.; he then rents the next door shop, in which he starts a new tailoring business under the name John Smith. Has B. any remedy, if so, what? Explain.

10. Explain what is meant by the doctrine of pressure as applied to assignments made by insolvent debtors.

Contracts—Statutes—Evidence.

1. "There is believed to be one positive exception in our law to the rule that the revocation of a proposal takes effect only when it is communicated to the other party." State the exception. How far is notice to the other party requisite?

2. "There are certain classes of cases in which it may be said that mistake, or at any rate ignorance, is the condition of acquiring legal or equitable rights." Explain this statement.

3. In what cases can an agent personally enforce contracts entered into by him on behalf of a principal?

4. A question arises on the true construction of an arbitration agreement, whether the subject matter of a particular dispute falls within the agreement. Who must decide this question? Explain.

5. A. covenants with B. to insure his (A.'s) life within a given time. Before the end of that time his health becomes so bad as to be uninsurable. What is the effect on his covenant?

6. A. sells goods to B., and desires B. to send for them. C. obtains the goods from A., by falsely representing himself as B.'s servant. How far would a sale by C. be valid against A.? Why?

7. How may the genuinneess of a disputed writing be proved?

8. In civil actions how far is the evidence of a husband as to communications made to him by his wife admissible?

9. What is the test for determining whether a plaintiff and defendant are in *pari delicto?*

10. In an action for disturbance of support of and what damages may the plaintiff recover?

Harris—Broom—Blackstone.

1. At what stage and on what grounds can a motion in arrest of judgment be made, and what is its effect if successful?

2. Give an example, showing under what circumstances the taking of a chattel against the will of the owner will be (*a*) justifiable, (*b*) a trespass, (*c*) larceny.

3. To what extent does intoxication afford a defence to a criminal charge?

4. What is the difference between a civil and a criminal proceeding for libel as regards the defence of the truth of the alleged libel being a good defence?

5. If a spark escaping from a locomotive engine sets fire to a house near the railway, is the company liable? If so, what must be proved to make it liable?

6. A gas company employs a contractor to lay down gas pipes in the street; by the contractor's negligence the street is obstructed, and an accident occurs. Who is liable? Why?

7. How far does the object for which a statutory duty is created affect the right of action for violation of it?

8. What difference is there between the rules regulating the right to subterranean water and those applicable to the enjoyment of streams and rivers above ground?

9. What is the gist of the offence of conspiracy?

10. Explain *allegiance*. "Once an Englishman, always an Englishman." How far is this maxim now true as respects the allegiance due to the Crown?

Real Property.

1. A solicitor for a purchaser serves a set of requisitions on vendor's solicitor, reserving to himself the right to make further and other requisitions. To what extent will this reservation hold good?

2. A. enters into a contract with B. for the sale to him of a property of which the description runs as follows in the agreement: A lot in the City of Toronto, more particularly described in a certain mortgage to the Canada Permanent; A. afterwards refuses to carry out the agreement, relying on the Statute of Frauds as a defence. Should he succeed? Explain.

3. A. by his will bequeathes all his personal estate to B., except $10,000 Dominion stock, which he bequeathes to C. C. dies during testator's lifetime, what becomes of the $10,000 bequest to C.? Reasons.

4. A. enters into a binding contract with B., for the sale to him of Blackacre free from all encumbrances. A.'s wife refuses to release her dower. Has the purchaser any remedy?

5. A bequest is made by a testator to his "relations;" who would be entitled?

6. It is usual to provide in conditions of sale that if any requisitions he made which the vendor shall be unable or unwilling to remove he shall be at liberty to rescind the contract. State the true meaning of such a condition.

7. What are the provisions of the Mechanics' Lien Act as to workman's wages?

8. Where there is a bequest to one person, and in case of his death to another, at what, in event of death, is the gift over construed to take effect?

9. Write a short note on what constitutes a signing of an agreement so as to satisfy the 4th section of Statute of Frauds.

10. A., by his will, makes an absolute gift of all his property to his wife, subject to the payment of debts and legacies; and further on in the will says, "it is my wish and desire that after my decease that my said wife shall make a will, dividing the real and personal estate hereby devised and bequeathed to her, among my children in such manner as she shall deem just and equitable."

State the rights of the wife and children under such bequest.

SOLICITOR.

Mercantile Law—Statutes—Practice.

1. A. leaves a sum of money with B. under such circumstances that it may be fairly presumed that B. has authority to use the money or not as he pleases. Distinguish the duties and liabilities of B. as he does or does not use the money.

2. A. agrees with B. to build B. a house. Before the building is finished, and during construction, the erections are burnt by accident. Who must bear the loss? Why?

3. A. pretends to be agent for C., and as such assumes to grant a lease of C.'s property to B. What damages ought B. to recover from A.?

4. From what losses is a carrier by water exempt at common law, and against what species of losses will not even the usual express exemptions in the carriage agreement exempt him?

5. A bond is made to A., B., and C. jointly, to secure payment of $1,000 to C.: C. dies. Who could maintain an action on the instrument at common law? Why? Is there any change now? If so, what?

6. State the present Statutory provisions in Ontario as to compensation for injuries to workmen.

7. A. has a factory in which B., C., and D. are employees; A. agrees with B., C., and D. that, in addition to wages, they shall be severally entitled to a share of the profits; the concern fails, and it is sought to make B., C., and D. liable as partners for the liabilities. What is their real position? What authority?

8. A. is killed in a railway accident in May, 1889; no letters of administration are taken out for his estate, but in April, 1890, his widow issues a writ against the company for damages; th company objects that the administrator should sue, and that there being no administrator, the action is not rightly brought. Is the objection right? Why?

9. State fully the limitations to the rights of a factor to pledge the property of the real owner.

10. In what cases can you get a writ of execution by leave of the Court?

Contracts.

1. Could the rights of a party under a contract be transferred by him to another at common law? If so, how?

2. State the principal rules as to acceptance in performance of a contruct.

3. What difference is there as to right of action by vendor against buyer where the property has or has not passed?

4. What is the liability of a carrier for delivery to a fraudulent purchaser?

5. What effect has a sale dependent on an act to be done by a third person?

6. If goods are sold on credit what is the effect of the transaction on the vendor's lien? Why?

Suppose the goods remain in the vendor's possession after the term for credit is expired, what is the effect?

7. A. signs a contract with B. for a purchase of goods over $40. He signs the contract without qualification. B. seeks to give oral evidence that A. signed really as agent for C. Can he do so? Why?

8. Explain the following expressions: "F. O. B." "Say about" such a quantity. "Sale or Return."

9. In what case is a sale of things not yet in existence good?

10. On a sale of an ascertained chattel is there any, and if so, what warranty of title?

CERTIFICATE OF FITNESS.

Real Property and Wills.

1. A bequest is made to the children of A., to be divided among them equally when they attain the age of twenty-one years. Some die before reaching twenty-one, others attain that age. How should the property be divided?

2. What rules govern where legacies are repeated (*a*) in one instrument, (*b*) in two instruments, viz., a will and a codicil?

3. Within what time must a will be registered? What is the effect of non-registration?

4. A bequest to "A. and his family." Construe this.

5. There are several persons tenants in common of certain lands, they mortgage the same. The mortgagee enters into and continues in possession for ten years. During the ninth year of his possession he gives one only of the mortgagors an acknowledgment in writing of his title. Who is entitled to redeem? Supposing the case of several mortgagees in possession for ten years, when in the ninth year one of them only gives an acknowledgment to the mortgagor, what effect has this? Reasons.

6. What are the provisions of the Vendors and Purchasers' Act, in respect of summary applications to the High Court?

7. State the nature of a mechanic's lien. Within what time must it be registered, and what steps are necessary to keep it existing?

8. A. owns a lot in Toronto, on a portion of this he has built a house whose windows look into the vacant portion of the lot. A. grants the vacant lot without any reservations to B., he then sells the house to C. B. shortly after commences building so as to obstruct the lights of the adjacent house. C. seeks to prevent him by injunction. Can he succeed? Explain.

9. Is taking possession of property by purchaser a waiver of title? Explain.

10. "A." gets his solicitor to draw up a will when in Toronto; this he leaves with a friend and proceeds to Manitoba. When there he writes to his friend to burn the will, which is done. Is this a good revocation of the will? Explain.

Equity.

1. A. and B. are partners in a mercantile concern. C. recovers a judgment against B. for a separate debt due him by B. What are the rights of a purchaser at sheriff's sale of B.'s interest in the firm? Explain fully.

2. Is possession of a property notice as against a registered title, if so, why? if not, why not?

3. A bequest to the Rector of St. James' Church, Toronto, for such charitable purposes as he may think proper. Is this good?

A testator leaves $5,000 to be invested for the poor of Toronto, naming B. his executor. B. dies during the testator's life, and no other executor is appointed. How can the fund be dealt with?

4. An executor desires to administer his testator's estate and distribute the residue without coming into court, how can he protect himself against the claims of creditors of which he has no notice?

5. Will a Court of Equity in any, and if so, in what case, decree specific performance of an agreement to enter into a partnership?

6. Distinguish between the duty of disclosure as to facts in cases of persons applying for policies of insurance, and those of creditors seeking to obtain a surety for the payment of a debt or performance of a contract.

7. What is a writ of arrest? Under what circumstances will the same be granted in this Province?

8. Where in an agreement a penalty is inserted for non-performance, can one of the parties elect to pay the penalty, where the other insists on performance? Explain.

9. In what way should a trustee having charge of trust funds act so as to provide against liability in the event of the failure of his bankers?

10. A., a resident of Toronto, dies there, letters of administration are taken out in Toronto, and A. having left property in New York State, aucillary letters are taken out there. What law governs as to the distribution of the assets there? Suppose there be a residue as to the foreign property after all claims paid, how can such residue be dealt with?

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LATEST ADDITIONS.

(COMPILED FOR THE CANADA LAW JOURNAL.)

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AUTUMN ASSIZES, 1890.

Armour, C.J.

Toronto Civil—Tuesday, September 2.
Toronto Criminal—Monday, October 13.
Milton—Wednesday, October 22.
Brampton—Wednesday, October 29.
St. Catharines—Tuesday, November 4.
Orangeville—Tuesday, November 11.

Rose, J.

Stratford—Monday, September 15
Hamilton—Monday, September 22.
Welland—Monday, October 6.
Guelph—Monday, October 13.
Simcoe—Monday, October 20.
Cayuga—Thursday, October 23.
Berlin—Monday, October 27.
Brantford—Monday, November 3.

Falconbridge, J.

Barrie—Monday, September 8.
Ottawa—Monday, September 22.
Pembroke—Wednesday, October 1.
L'Original—Tuesday, October 7.
Perth—Monday, October 13.
Owen Sound—Monday, October 20.
Peterborough—Wednesday, October 29.
Lindsay—Tuesday, November 4.

Street, J.

Kingston—Monday, September 8.
Brockville—Monday September 15.
Cornwall—Tuesday, September 23.
Belleville—Monday, September 29.
Picton—Monday, October 6.
Napanee—Monday, October 13.
Cobourg—Monday, October 20.
Whitby—Monday, October 27.

MacMahon, J.

London—Monday, September 8.
Woodstock—Thursday, September 18.
Walkerton—Monday, September 29.
Goderich—Monday, October 6.
Sarnia—Monday, October 13.
Sandwich—Monday, October 20.
Chatham—Monday, October 27.
St. Thomas—Wednesday, November 5.

AUTUMN CHANCERY SITTINGS, 1890.

Robertson, J.

Toronto—Monday, November 17.

Boyd, C.

St. Thomas, Wednesday, October 1.
London—Monday, October 6.
Barrie—Monday, October 13.
Walkerton—Monday, November 10.
Goderich—Friday, November 14.
Sarnia—Tuesday, November 18.
Sandwich—Friday, November 21.
Chatham—Wednesday, November 26.
Whitby—Monday, December 8.

Ferguson, J.

Cobourg—Monday, September 15.
Lindsay—Friday, September 19.
Peterborough—Tuesday, September 23.
Ottawa—Monday, October 20.
Brockville—Monday, October 27.
Cornwall—Friday, October 31.
Belleville—Tuesday, November 4.
Kingston—Monday, December 1.

Robertson, J.

Simcoe—Tuesday, September 16.
Owen Sound—Tuesday, September 23.
Brantford—Tuesday, September 30.
St. Catharines—Monday, October 6.
Stratford—Monday, October 13.
Hamilton—Monday, October 20.
Woodstock—Monday, November 3.
Guelph—Monday, November 10.

Appointments to Office.

SUPERIOR COURT JUDGES.

Quebec.

The Honorable Marcus Doherty, Judge of the Superior Court in and for the Province of Quebec, to be Assistant Judge of the Court of Queen's Bench for the said Province.

Nova Scotia.

Nicholas Hogan Meagher, of Halifax, to be a Judge of the Supreme Court of Nova Scotia, *vice* the Honorable Henry W. Smith, deceased.

COUNTY JUDGES.

Ontario—York.

Frederick Montye Morson, of Toronto, Barrister, to be Deputy Judge of the County Court of the County of York, from the 20th of June to the 20th of September, 1890.

New Brunswick—Westmoreland and Kent.

Pierre Cormand Landry, of Dorchester, Barrister, to be the Judge of the County Courts of Westmoreland and Kent, *vice* Bliss Botsford, deceased.

POLICE MAGISTRATE.

Prescott.

Frederick William Thistlethwaite, of Vankleek Hill, Barrister, to be Police Magistrate in and for the Village of Vankleek Hill, without salary, *vice* James Boyd, deceased.

CLERK OF THE PROCESS.

Ontario.

James Strachan Cartwright, of Toronto, Barrister, to be Clerk of the Process of the High Court of Justice for Ontario, *pro tempore*, *vice* William Beverley Heward, deceased.

ASSOCIATE CORONERS.

Kent.

Robert Nelson Fraser, of Thamesville, Doctor of Medicine, to be an Associate Coroner within and for the County of Kent, *vice* Richard Drake Swisher, M.D., deceased.

Duncan P. McPhail, of Highgate, Doctor of Medicine, to be an Associate Coroner within

and for the County of Kent, *vice* Andrew Decow, M.D., removed from the County.

Lambton.

Anthony Rayburn Hanks, of Oil Springs, Doctor of Medicine, to be an Associate Coroner within and for the County of Lambton.

DIVISION COURT CLERKS.

Manitoulin.

William John Tucker, of Manitowaning, to be Clerk of the Fourth Division Court of the said temporary Judicial District of Manitoulin, *vice* H. S. Francis, resigned.

Peterborough.

Wesley Sherin, of Lakefield, to be Clerk of the Fourth Division Court of the County of Peterborough, *vice* Samuel Sherin, resigned.

DIVISION COURT BAILIFFS.

Dufferin.

Alfred Finbow, of Grand Valley, to be Bailiff of the First Division Court of the County of Dufferin, *vice* Alfred Beals, resigned.

COMMISSIONERS FOR TAKING AFFIDAVITS.

John Alexander McGregor, of Montreal, to be a Commissioner for taking Affidavits within and for the City of Montreal, and not elsewhere, for use in the Courts of Ontario.

Alexander Mutchmor, of Ottawa, to be a Commissioner for taking Affidavits within and for the Province of Quebec, and not elsewhere, for use in the Courts of Ontario.

Harry Treadway Jones, of Halifax, Barrister, to be a Commissioner for taking Affidavits within and for the City of Halifax, and not elsewhere, for use in the Courts of Ontario.

ERRATUM.--In our Ottawa correspondent's letter on Dominion Legislation of last Session, in our last number, we regret several printer's mistakes occur. "l'Original time" should read "L'Orignal time"; in the quotation from Hamlet, "thrive" is inserted for "shove"; and in the fifth line following the quotation, for "taxation" read "lesion."

Law Society of Upper Canada.

LAW SCHOOL—HILARY TERM, 1890.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

CURRICULUM OF THE LAW SCHOOL.

Principal, W. A. REEVE, Q.C.

Lecturers, E. D. ARMOUR. A. H. MARSH, LL.B.

Examiners, R. E. KINGSFORD, LL.B. P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto, are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate

Examinations as the case may be. At the first Law School Examination to be held in May, 1890, fourteen Scholarships in all will be offered for competition, seven for those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one o. sixty dollars, and five of forty dollars for each of the two classes of students

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School :

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other ora methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3.

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be deliver d by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Pmith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively. On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

VOL. XXVI. JULY 16, 1890. No. 12.

DURING the long vacation, Mr. Justice Ferguson will be the vacation judge in the Chancery Division, and Mr. Justice Street during part of vacation in the other Divisions. Tuesday in each week is fixed as the day on which vacation motions should be made.

LET not our readers expect two numbers each month during vacation; if they do they will be disappointed. We think we are very good to them to give them anything at all this warm weather. We wish it could be said with truth that all of our hard-worked brethren were "away on their vacation." If it could be so said, *we* would be ditto. But some of them are detained because the long vacation is not a vacation; some because the tariff of fees is not revised contemporaneously with the increased cost of living, whilst counsel take care that their fees *are* increased year by year; and some because they have mistaken their vocation, and need never expect to make enough even to indulge in the luxury of reading these pages.

THE attention of students is directed to the special notice at the end of the Law Society's advertisement in this number, by which all papers required to be filed before final examinations must be filed with the secretary on or before the third Saturday before term, and fees paid at the same time. Each affidavit of execution must state the *date of execution* of the articles of assignment. Students who failed at the Law School examination in May last, and desire to present themselves for examination in September next, should give notice to that effect to the secretary on or before August 18th, stating in the notice whether they intend to present themselves for examination in all the subjects, or only in those in which they failed to obtain 55 per cent. of the marks, mentioning the names of such subjects.

IT may not be known that some years ago it was formally recommended by a Committee appointed by the Lord Chancellor, composed of some of the most eminent judges and prominent members of the Bar in England, that litigation should thereafter be conducted in the High Court of Justice without any pleadings: "the Committee is of opinion that, as a general rule, the questions in controversy between litigants may be ascertained without pleadings." The following rule was recommended by the Committee, "No pleadings shall be allowed unless

by order of a judge." For pleadings there was to be substituted a brief endorsement on the writ of summons, indicating the nature of the plaintiff's claim, and a brief notice from the defendant of any special defence, such as the Statute of Limitations or payment. This interesting report, which is signed by Lord Coleridge, James, L.J., Hannen and Bowen, JJ., the Attorney-General, the Solicitor-General, and others, may be found in the London *Times* for Oct. 8, 1881.

Two questions of some moment were recently debated before the Divisional Court of the Chancery Division. One was as to the right of the Lieut.-Governor of Ontario to exercise the Royal prerogative of pardon respecting offences against Provincial statutes. This question was formally raised by a suit between the Attorney-General for Canada as plaintiff, and the Attorney-General for Ontario as defendant, instituted under the provisions of sect. 52, s-s. 2 of the Judicature Act, to determine the validity of the Ontario statute, 51 Vict., c. 5, which purports to confer the power in question on the Lieut.-Governor. The case was argued with great ability by Mr. Christopher Robinson, Q.C., and Mr. Lefroy, for the Dominion, and by the Hon. Mr. Blake, Q.C., for the Province. While it would be out of place to attempt to forestall the decision of the Court, we may nevertheless rejoice that a beginning has been made in thus submitting to judicial decision questions in dispute between the Dominion and Provincial authorities. It is far better that where differences do arise they should be properly settled in this way, than be suffered to remain a constant source of bickering and irritation between the two governments. The temptation to Provincial politicians is to stretch their authority at the expense of the Dominion Government, and of the Dominion authorities to stretch their power at the expense of the Provincial Government. But whatever politicians for their own ends may do, the people must ever bear in mind that they are equally interested in both Provincial and Dominion Governments, and that both are intended to promote their welfare, and exist for that and no other purpose, and that all they are really concerned to see is that the power vested by the Constitution in these two governments shall be exercised according to the Constitution, and that neither government shall unduly encroach upon the province of the other. It is not a question whether Mr. Mowat or Sir John Macdonald is best fitted to advise Her Majesty in the exercise of the prerogative of pardon in the cases in question, but in which of the two governments the Constitution has placed this power; and that is purely a question of law. This particular question, we observe, was raised in Nova Scotia as long ago as 1868, and it has been simmering ever since. The other question to which we refer is as to the criminal jurisdiction of the Chancery Division, which arose incidentally upon an application in the case of *Regina* v. *Burchall* to commit certain newspaper editors for contempt of court in publishing matter calculated to prejudice the fair trial of the defendant, who is in gaol on a charge of murder. The Divisional Court (the Chancellor and Ferguson, J.) were divided in opinion. The Chancellor thinking that the Divisional Court could exercise the general criminal jurisdiction of the High Court; and Ferguson,

J., being of opinion that criminal jurisdiction is vested in the High Court as a whole, and that while the Queen's Bench and Common Pleas Divisions, as being continuations of the former Courts of Queen's Bench and Common Pleas, can respectively exercise a general criminal jurisdiction, yet that no provision has been made enabling the Chancery Division, or its Divisional Court, to exercise any general criminal jurisdiction. This, of course, does not apply as regards Crown cases reserved for the disposition of which each of the Divisions of the High Court is expressly constituted a Court (R.S.C., c. 174, s-s. 2, 259 *et seq.*). What is needed, according to the view of Ferguson, J., is some enactment by the Dominion Parliament, enabling the judges of the Chancery Division singly, or when sitting in the Divisional Court of that Division, to exercise the general criminal jurisdiction vested in the High Court. Owing to the division of opinion the decision has not the same weight it would have had, had the learned judges been agreed, but, though lacking in conclusiveness, it has nevertheless made clear that the point is one open to doubt, and this should be removed at the next session of the Dominion Parliament. In remodelling the Courts, as was done by the Judicature Act, it is obvious that owing to the divided powers of legislation possessed by the Dominion and Province, and to the diverse nature of the jurisdiction exercised by the former Courts, that, in order to properly carry out what was intended, concurrent legislation by both legislatures was necessary, and it was a pity that it was not secured at the time.

INEQUALITY OF CRIMINAL SENTENCES.

In most cases under the Criminal Statutes, there is a discretion in the trial judge, within certain limits, as to the extent and duration of the sentence imposed. In such cases it must be a painful and anxious duty for a conscientious judge to decide the punishment to be inflicted in each particular case. We extract from one of our exchanges the following clear exposition of the principles which ought to govern the judge under such circumstances:

"The recent debate in the House of Lords has again brought forward this much-vexed question. Lord Herschell desired to call attention to the difference of opinion which prevailed as to the principles which should regulate the severity of the sentences to be inflicted upon criminal offenders, and the consequent inequality in the sentences passed in cases of the like gravity. It is to be regretted that the noble lords who followed him did not confine themselves more to the main point of Lord Herschell's theme, which was the difference of opinion as to the principles of punishment. It is generally accepted that punishment may proceed on the theory of reformation of the criminal, of the prevention of crime, or of retribution; and it seems that, in truth, all these elements should be taken into consideration in attempting to fix a canon or standard system of sentences. A criminal is punished in the first place for the greater safety of the community; secondly, to satisfy and remove the craving for personal vengeance; and lastly, for his own good. And, in our opinion, this is the proper order in which these elements should be taken into consideration.

Now, in the House of Lords, Lord Coleridge is reported to have said that, if he questioned anything in the speeches of his noble and learned friends, it was their use of the word "principle," for he doubted very much whether those who administered the criminal law were conscious, when pronouncing sentence, of administering law according to any elaborate and philosophical principle. But we should hold it to be one of the first duties of those who are called to the office of a judge amongst us to try and keep before them a right principle, and to apply it to the facts in passing sentence, just in the same way as if they were giving judgment in a civil case. This is absolutely the only way in which anything like equality of sentences can be obtained without sacrificing the substance for the shadow of justice. It is, of course, impossible to prevent the misapplication of principle to facts, and the principle must, in the nature of things, be so framed as to be very wide in its terms. But there are, it will be found on consideration of the subject, many safeguards that will keep the judge from going very far wrong.

The first object, as already stated, to be kept in view is the greater safety of the community. With reference to this object the facts may be grouped somewhat in the following way: The nature of the crime must be considered. If it affects that which every member of the community possesses, the punishment must be the more deterrent, as any member may be liable to suffer from the like crime at any future time. In this view of the case, offences occasioning bodily injuries would be regarded as more heinous than those involving injuries to property, and we think, to a certain extent, this ought to be so. Then it must be considered whether the like offences are rife in the neighbourhood, so as to occasion a widespread feeling of terror or insecurity. It may here be observed that crimes committed in combination by several offenders should be punished more severely than isolated offences by single criminals, because the existence of combinations antagonistic to the general interests of the community is more dangerous to public safety than any single individual can be, however many offences he can commit. With regard to offences against property, it seems that injuries to public property should be punished more severely than those against private property, and in punishing injuries against private property, it may fairly be taken into account whether such property is of a nature to be beneficial to the community such as industrial property, or is purely for the benefit of the individual possessor. Lord Coleridge remarked that the one most important duty of a judge was to take care that a sentence did not enlist the sympathy of the public on the side of the criminal. It is obvious that if the judge keeps always in view the greater safety of the community as the first object of punishment, he will run far less risk of enlisting public sympathy on the side of the criminal, especially if, in sentencing him, he takes care to make it clearly appear how far the offence is a violation of the public right. The repetition of offences is not always of great importance in this connection, and that is why it has not been sooner referred to. Its importance really depends upon the class of offence, so far as the public are concerned. It should always be remembered that the preventive power of punishment is strictly limited. In the

case of repeated offences, it comes to be limited solely by the length of the term of imprisonment awarded to inveterate offenders.

The second object of punishment, as above stated, is retribution. It is quite hopeless to urge that this element should not be taken into account. Unless the desire for vengeance is in some way gratified by the law, the injured party takes the law into his own hands. Besides, if justice is retributive, it has a better deterrent effect. It stands in a sort of way in the place of compensation. The prisoner pays with his body. But, for practical purposes, this object need not be kept so clearly in view by the judge as the first object of prevention of further crime. A punishment which is sufficient to secure the prevention of further crime is generally sufficient to satisfy the party actually injured.

The third and last object of punishment is the reformation of the criminal. If a punishment is sufficient to prevent a criminal, either by its deterrent effect or by main force during its continuance, from the further commission of crime, that is the utmost extent of reformation with which punishment has practically to do. It cannot be altogether lost sight of in inflicting punishment, because it is to that extent involved in the first object of punishment, namely, the prevention of crime. But a real reformation consists not only in ceasing to do evil, but in learning to do good. And it is plain that the teaching of how to do good can scarcely be accomplished within the same period that will suffice for the first half of the lesson, namely, as to ceasing to do evil.

In the debate in the House of Lords, Lord Herschell at first asked the Government whether they would cause inquiry to be made by Royal Commission, Committee, or otherwise, into our present system of punishments and the principles which should guide its administration, and whether it was possible to diminish the unequal incidence of punishments and to render them more effectual. At the conclusion of the debate he merely expressed a hope that the Government would give the matter early attention, and that if no other inquiry was made than that by themselves, they would, before proposing any legislation, favour the House with returns or statistics as to the results of light sentences where they had been tried.

Lord Coleridge thought that the establishment of a Court of Criminal Appeal would have a most powerful effect in promoting greater uniformity of sentences. A steady course of decisions by such a court, disregarding as it would all emotional feelings which tended to warp the judgment, would certainly, he believed, have that effect, for those who inflicted sentences would know that they were subject to revision. But if there was to be a Court of Appeal it must have the power, not only of reducing punishment, but also of increasing inadequate sentences. He did not desire that the Court should simply diminish punishment; he desired to make it useful in accordance with the righteous sentiment of the community.

There may be, with deference, room for doubt whether the constitution of a Court of Criminal Appeal would not do more harm than good in regard to inequality of sentences. As a rule the criminal classes are poor, and would have

great difficulty in finding funds to appeal, and so where the inequality bore hardly upon them they would submit to it; whilst, on the other hand, they would be pretty sure to have to defend an appeal in case their sentence appeared too light to the prosecutor, or else would have to run the risk of not being represented in defending the appeal. Besides, it would take long before a course of decisions would be established, and when established, or in course of being established, trials would be prolonged in the courts below, in order that the authorities might be brought to their notice. And there would, of course, be the less inducement to care in sentencing if it was generally felt that the case was pretty sure to be appealed.

Legislation could only to a certain extent prevent inequality of sentences by graduating a scale of punishment according to extenuating or aggravating circumstances. There is no doubt that there is room for some improvement in this direction. The first reform is obviously that in cases of murder the judge should not be obliged to pass the extreme sentence of the law. This could be altered either by leaving it entirely to the discretion of the judge, or by a statutory distinction between murder in the first degree and murder in the second degree, making the latter offence punishable by penal servitude for life, or for a less term, not being less than a certain minimum, at the discretion of the judge. There are also less serious crimes with regard to which there might be some judicial discretion. Then, with regard to previous convictions, rules might be laid down of simple character. For instance, with regard to larcenies, where, on a conviction for larceny, previous convictions for larceny of similar articles under similar circumstances were proved, the punishment should be increased sharply for the second, third, or fourth offence, but for subsequent offences the maximum should be inflicted. But where the previous convictions were for offences of a different character, they should be taken into account only so far as they led up naturally to the crime for which the punishment to be inflicted was under consideration, as where the prisoner had proceeded from picking pockets to robbery with violence, or from larceny to housebreaking, or shop-lifting to burglary.

The best of all remedies for inequality of sentences lies, no doubt, with the judicial authorities themselves. By careful self-education in the principles of punishment as generally received in this country, and there can be no question but that the general outlines are now settled, and by an intercommunication of information amongst themselves, the judicial authorities can do more than can be done for them to put them in the right way. If a man accepts the office of a judge without any previous legal experience, surely he ought to spare the time at least to consider the principles of the punishment of offenders; and the courts of general and quarter sessions might well interchange information as to sentences which would be worth their mutual attention.

The Lord Chancellor, in the course of the debate in the House of Lords, said that it was sometimes thought that particular classes of judges were more disposed than others to pass severe sentences. He believed that this was an error, and that there was no such distinction between classes of judicial functionaries, and he was therefore glad that Lord Herschell was not one of those who were

in the habit of attacking magistrates and chairmen of quarter sessions. Nevertheless, notwithstanding his Lordship's remarks, it is obvious that there must necessarily be more divergence in the views with which magistrates inflict punishment than amongst the judges of the High Court, because whilst the judges of the High Court have all been trained in the same school, the magistrates are drawn from different professions, which naturally induce different habits of thought and afford differing standpoints for the view of administering criminal justice. The judges, too, have much greater opportunities of interchanging their ideas on the subject than the magistrates have. The magistrates, therefore, have all the greater need of using the best means at their disposal for studying the practice of the bench in adjoining jurisdictions. Special provisions have quite recently been passed providing for the expenses of associations of county councils who are performing administrative functions recently exercised by the justices without any advantage of that sort. There seems to be no reason why the justices should not have similar facilities with regard to the discussion of the duties that yet remain to them. It has been always one of the great defects of the administration of criminal justice in this country that the jurisdictions of the several judicial authorities have been too much hedged about from each other, so as to be almost foreign countries to each other. There should be some better provisions for maintaining an interchange of ideas, and the best will then be found generally to prevail with less sharp contrasts than now obtain."

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for June comprise 24 Q.B.D., pp. 625-754; 15 P.D., pp. 81-121; 44 Chy.D., pp. 1-217; 15 App. Cas., pp. 49-202.

PRACTICE—DISCOVERY—INSPECTION OF DOCUMENTS.

In *Wideman* v. *Walpole*, 24 Q.B.D., 621, the Court of Appeal (Lord Esher, M.R., and Lopes, L.J.) permitted an affidavit to be filed by plaintiff denying the possession or control of a document ordered to be produced for inspection, and thereupon the appeal from the order made by the Divisional Court (24 Q.B.D., 537) noted *ante* p. 295, was reversed with costs.

PRACTICE—PLEADING—MATTER IN AGGRAVATION OF DAMAGES—LIBEL—ORD. XIX., R. 27 (ONT. RULE, 423).

In *Whitney* v. *Moignard*, 24 Q.B.D., 630, a point of practice was disposed of by a Divisional Court (Huddlestone, B., and Williams, J.). The question was one of pleading in an action for libel, published in a newspaper. The statement of claim alleged that the defendant knew that the words published would be, and the same in fact were, repeated and published in other editions of the same newspaper. It was held that the evidence of the facts stated in the paragraph would be admissible at the trial, and therefore the paragraph was properly

pleaded and ought not to be struck out. This decision seems to be the converse of *Pursley* v. *Bennett*, 11 P.R., 64, in which it was held that facts in mitigation of damages may be pleaded by a defendant, though the contrary was held in England in *Wood* v. *Durham*, 21 Q.B.D., 501.

PRACTICE—INFORMATION—CONVICTION—ALTERNATIVE STATEMENT OF OFFENCE.

Cotterill v. *Lempriere*, 24 Q.B.D., 634, is a case in which, to use the language of Lord Coleridge, C.J., the Court, "with extreme reluctance," gave effect to a technical objection as to the sufficiency of an information and conviction for an offence against a by-law, which provided that "no smoke shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public." The information stated that the defendant did permit smoke to escape from his engine contrary to the by-law, and the conviction was to the same effect. On a case stated by the convicting magistrates, it was objected that the offence being stated to have been committed contrary to the by-law, without specifying whether the offence was a reasonable ground of complaint to the passengers or the public, or both, the offence was stated in the alternative, and was therefore bad, although the same penalty was imposed by the by-law whether the passengers or public were injured.

SALE OF GOODS—CONTRACT TO MANUFACTURE EQUAL TO SAMPLE—LATENT DEFECT IN SAMPLES—IMPLIED WARRANTY.

In *Jones* v. *Padgett*, 24 Q.B.D., 650, upon an objection to the charge of the judge at the trial, a question of law was decided by a Divisional Court (Lord Coleridge, C.J., and Lord Esher, M.R.), on appeal from a County Court. The plaintiff carried on two businesses, that of a woollen merchant, and that of a tailor. The defendants, not knowing that he carried on the business of a tailor, contracted to manufacture cloth for the plaintiff according to sample. The plaintiff intended to use the cloth in his business of a tailor for making into liveries, but he did not communicate this to the defendants. There was evidence that cloth of the kind in question was ordinarily employed in making liveries. The cloth was made according to the samples, but owing to a latent defect in the sample, it was unsuitable for making into liveries, but there was no evidence that it was unsuitable for other purposes for which such cloth was ordinarily employed. The action was for breach of an implied warranty of merchantableness. The judge left it to the jury to say whether the cloth was merchantable as supplied to woollen merchants, and refused to leave the question to them whether an ordinary and usual use of such cloth was the making of it into liveries. The plaintiff objected, but the Court of Appeal held the trial judge was right. It was contended by the plaintiff that the doctrine established by *Jones* v. *Bright* 5 Bing., 533, that where goods are sold which the vendor knows are to be used for a particular purpose, there is an implied warranty that they are fit for that purpose, had been extended by *Drummond* v. *Van Ingen*, 12 App. Cas., 284, so as to create an implied warranty that goods are fit for the purpose which the vendor ought to know that such goods are ordinarily used, but the Court refused to accede to that proposition.

NUISANCE—THISTLES—NEGLECT OF OCCUPIER OF ADJOINING PROPERTY TO CUT THISTLES—NOXIOUS WEEDS.

Giles v. *Walker*, 24 Q.B.D., 656, shows that in the absence of legislation such as that contained in *The Municipal Act* (R.S.O., c. 184, s. 489, s.s. 22), empowering municipalities to pass by-laws for preventing the growth of noxious weeds, there is no legal liability on the part of an owner of land to cut down noxious weeds so as to prevent the seed therefrom being blown on to the lands of his neighbour. Lord Coleridge, C.J., and Lord Esher, M.R., sitting in appeal from a County Court, in which judgment had been entered for the plaintiff on a finding of the jury that the defendant had been guilty of negligence, reversed the judgment and dismissed the action.

MARINE INSURANCE—INSURANCE AGAINST SUM PAID BY ASSURED FOR DAMAGE BY COLLISION WITH ANOTHER SHIP—LIABILITY OF SHIPOWNER WHEN BOTH SHIPS ARE TO BLAME.

The London Steamship Ins. Co. v. *The Grampian Steamship Co.*, 24 Q.B.D., 663, is a case in which the plaintiff sought to enforce a policy of insurance against a loss occasioned by the ship assured having come into collision with another vessel, in consequence of which both vessels being to blame, they had to share the damage equally. The question was whether this was a cross liability on the part of each vessel to pay half the damage sustained by the other. The Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.) held that there was not a cross liability, but one liability only, viz., the liability of the vessel less damaged to pay the more damaged one, half of the amount by which the damage to the one exceeds the damage to the other. The plaintiff's vessel being the less damaged vessel of the two, it was therefore held that he could not recover on the policy.

PHARMACY ACT, 1868 (31 & 32 VICT., C. 12), S. 15 (R.S.O., C. 151, S. 24)—SALE OF POISONS—UNREGISTERED ASSISTANT OF REGISTERED CHEMIST—PENALTY.

In *The Pharmaceutical Society* v. *Wheeldon*, 24 Q.B.D., 683, an important point was decided under the Pharmacy Act, 1868 (see R.S.O., c. 151, s. 24). The action was brought against an unregistered assistant of a registered chemist for selling poisons in the absence of his master; and it was held that he was liable to the penalty imposed by the Act. This is an exception to the rule *qui facit per alium facit per se.*

SESSIONS—PRACTICE—APPEAL FROM CONVICTION—RECOGNIZANCE OUT OF TIME—ESTREATING RECOGNIZANCE.

The short point decided in *The Queen* v. *The Justices of Glamorganshire*, 24 Q.B.D., 675, is that when an appeal from a conviction is dismissed with costs because the recognizance is not put in in due time by the appellants, the recognizance is not a nullity but may nevertheless be estreated, if the appellant fails to pay the costs of the appeal.

STOCK EXCHANGE—USAGE OF STOCK EXCHANGE, REASONABLENESS OF—RIGHT OF BROKER TO CLOSE ACCOUNT.

In *Davis* v. *Howard*, 24 Q.B.D., 691, the reasonableness of the usage of the stock exchange, whereby it is competent for a broker to close an account of a

principal who has instructed him to carry over stock to the next settlement, when the principal has not, after notice, paid the balance due to the broker on the settling day, or placed at the broker's disposal funds or available collateral security sufficient to cover the balances was in question; and was upheld.

PRACTICE—DISCOVERY—OFFICER OF CORPORATION—PRIVILEGE—SOLICITOR.

Salford v. *Lever*, 24 Q.B.D., 695, establishes an important distinction in reference to the practice of discovery by corporations. In *Swansea* v. *Quirk*, 5 C.P.D., 106, it was held that where a corporation itself puts forward its town clerk to make discovery on its behalf, then, when the town clerk is a solicitor, he cannot refuse to answer on the ground of professional privilege. But in the present case where the opposite party had selected the town clerk as the officer to make discovery, he might properly refuse to answer on the ground of privilege as solicitor.

ILLEGAL CONTRACT — PART PERFORMANCE — ACTION TO RECOVER MONEY PAID UNDER ILLEGAL CONTRACT.

Kearley v. *Thomson*, 24 Q.B.D., 742, is an illustration of the familiar maxim, *in pari delicto potior est conditio possidentis*. The facts of the case were that one Baynes, for whom the defendants acted as solicitors, presented a petition in bankruptcy against one Clarke. Before the day fixed for the public examination of the bankrupt, and before he had applied for his discharge, Kearley, who was a friend of Clarke, intervened, and the solicitors, accepted from him £20 on account of their costs, and agreed on his paying them £20 more to waive all claim to costs, and undertook not to appear at the bankrupt's public examination. The second £20 was duly paid and the defendants did not appear at the examination; but at the time the action was brought Clarke had not applied for his discharge. This was an illegal bargain and the plaintiff brought the action to recover the £40. The Court of Appeal (Lord Coleridge, C.J., Lord Esher, M.R., and Fry, L.J.) held the case to be governed by the rule laid down in *Collins* v. *Blantern*, 1 Sm. L.C. (7th ed.) 369, viz., "Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to fetch it back again; you shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back." It was sought to bring the action within the authority of *Taylor* v. *Bowers*, 1 Q.B.D., 291, on the ground that the illegal purpose had not been wholly carried out. But Fry, L.J., while doubting the authority of that case, nevertheless was clear that the fact that there had been a partial performance of the illegal contract could not entitle the plaintiff to recover his money. He likened it to the case of A. paying money to B. to murder C. and D., and claiming to recover the money back after B. had murdered C., but before he had murdered D. The statement of the proposition seems to carry its own refutation.

PRACTICE—WRIT OF SUMMONS—ADDRESS OF PLAINTIFF—ORD. IV, R. 1 (ONT. RULES 240, 241).

In *Stoy* v. *Rees*, 24 Q.B.D., 748, the Court of Appeal affirmed a decision of a Divisional Court, to the effect that the address of a plaintiff required by the Rules to be indorsed on a writ of summons, is the place where he resides, and not merely the place where he carries on business. We may observe that the Ont. Rules 240, 241 require the plaintiff's place of residence to be indorsed only when he sues in person.

PRACTICE—INTERPLEADER—CLAIM OF APPLICANT FOR CHARGES—JURISDICTION TO ORDER PAYMENT—ORD. LVII, RR. 2, 15—(ONT. RULES 1142, 1153).

In *De Rothschild* v. *Morrison*, 24 Q.B.D., 750, Lord Coleridge, C.J., and Fry, L.J., sitting as a Divisional Court, held that under Ord. lvii., rr. 2, 15 (see Ont. Rules 1142, 1153) the Court has jurisdiction upon the determination of an interpleader issue to order payment to the party at whose instance the interpleader issue was granted, of his charges against the goods in question (which in the present case were for wharfage).

MARRIAGE—FOREIGN LAW—MARRIAGE OF BRITISH SUBJECT TO JAPANESE.

In *Brinkley* v. *Attorney-General*, 15 P.D., 76, a petition was presented under the Legitimacy Declaration Act, 1858 (21 and 22 Vict., c. 93; see R.S.O., c. 113, s. 33), praying for a declaration of the validity of the marriage of the petitioner, who was a British subject, with a Japanese woman. Evidence was adduced which showed that the marriage was valid according to the law of Japan, and that by such marriage the petitioner was precluded from marrying any other woman during the subsistence of the marriage. It was held by Sir James Hannen, P.PD , that the marriage was valid, and free from the objection which exists to a polygamous union. He took occasion to observe that although in the previous case the phrase "Christian marriage" had been used as indicating the only marriage that could be recognized as lawful, that that phrase had only been used for convenience, but that the idea intended to be expressed was that the only marriage recognized in Christian countries, and in Christendom, is marriage of the exclusive kind, whereby one man unites himself to one woman to the exclusion of all others. We may observe that it appears from this case to be the practice under the Legitimacy Declaration Act to notify the Attorney-General of the petition in a case of this kind; we presume this is to guard against such declarations being granted improperly, or without due consideration.

SHIP—COLLISION—OBSCURATION OF LIGHTS.

In *The Duke of Buccleuch*, 15 P.D., 86, it was held by the Court of Appeal, reversing Butt, J., that the mere fact that a vessel coming into collision with another had its lights obscured is not conclusive evidence of negligence on the part of such vessel, and that it was the duty of the Court in such a case to inquire into the facts in order to ascertain whether the infringement of the regulations relating to lights could possibly have contributed to the collision, and upon the evidence in this case it was held that it could not.

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

EASTER TERM, 1890.

The following is a *resume* of the proceedings of Convocation during the above term:—

The following gentlemen were called to the Bar, viz.:

May 19th.—James Herbert Denton, with honors and silver medal; William Howard Hunter, with honors and silver medal; Charles Wesley Kerr, with honors and bronze medal; and Cyrus Stiles, William George Richards, Mahlon Kitchen Cowan, William James Green, Arthur James Forward, James Duncan Lamont, Harper Armstrong, James Russell Lovett Starr, Joseph Stockwell Walker, Frederick Cuyler Hastings, Miller Murdoch, William James Williams, Robert Elliott Lazier, Thomas Atkins Wardell, Dugald James MacMurchy, Lennox Irving, Robert Franklin Lyle, Edward Albert Forster, Caleb Everett Lyons, Henry Parker Thomas, Frank Leslie Webb, Robert Lazier Elliott.

May 20th.—Joseph Heighington (special case), Robert Barrie, James Henry McGhie.

May 30th.—Andrew Grant.

The following gentlemen were granted certificates of fitness as Solicitors, viz.:

May 19th.—C. Stiles, W. J. Green, F. C. Hastings, F. L. Webb, G. E. K. Cross, C. E. Lyons, F. B. Geddes, R. F. Lyle, J. H. Cooper, J. W. Mealey, N. Mills, A. Grant.

May 20th.—C. W. Kerr, R. L. Elliott, P. K. Halpin.

May 30th.—W. G. Richards, W. A. Smith, W. L. Ross, W. McBeth Sutherland, J. H. Denton.

The following gentlemen passed the Second Intermediate Examination, viz.: H. J. D. Cooke, C. P. Blair, W. M. Campbell, C. F. Maxwell, G. F. Downes, W. M. McKay, W. S. Middlebro, J. Steele, W. W. Scane, L. A. Smith, J. Lennon, F. Elliott, H. B. Travers, W. S. Buell, W. J. Clark, T. A. Gibson, F. Harding, R. H. McConnell, B. E. Swayzie, W. H. Williams, R. A. Hunt, J. H. McCurry, A. R. Walker, J. Armour, J. W. Winnett, F. C. Cousins, R. T. Harding, and W. A. Boys, J. H. Hegler, A. A. Roberts, as students-at-law

The following gentlemen passed the first Intermediate Examination, viz: H. A. Lavell, M. J. O'Connor, J. D. Swanson, J. H. Rodd, D. E. Stuart, E. G. Rykert, T. H. Lennox, G. F. Blair, F. W. Gladman, F. King, E. Donald, W. D. Card, W. Carney, P. S. Lampman, F. Jones, H. A. Stewart, C. S. Leitch, L. B. C. Livingstone, J. B. Irwin, G. M. Vance, H. C. McLean, S. S. Martin, W. F. Scott, J. H. Senkler, and A. F. H. Mills C. F. Mills as students-at-law.

The following gentlemen were entered as Students-at-Law and Articled Clerks, viz.:

Graduates—James Macalister Farrell, Charles O'Connor.

Matriculants—David Inglis Grant, Nicholas Charles Sparks, Charles William Beatty, John Galbraith, Thomas Bird German, Joseph Pierce Rogers Gundy, Samuel Herbert McKay, Frank Drake Llewellyn Smith, Richard D'Arcy Scott.

Monday, May 19th.

Convocation met.

Present—The Treasurer and Messrs. S. H. Blake, Cameron, Foy, Hoskin, Irving, Kerr, Lash, McCarthy, McMichael, Mackelcan, Martin, Moss, Murray, and Osler.

The minutes of last meeting were read and approved.

Mr. Osler gave notice of motion for the third meeting of Convocation this term, as follows:

(1) That he would introduce a rule to provide for the publication of an annual Official Law List.

(2) To amend the 44th Rule so as to make the salary of the assistant reporter of the Court of Appeal twelve hundred dollars per annum.

(3) That the Supplemental Digest, as now printed in Robinson & Joseph's Digest, be included in the new Ontario Digest, now in preparation, and that the Reporting Committee be authorized to make the necessary arrangements with Mr. Joseph.

Mr. Hoskin, from the Discipline Committee, presented a report in the case of Mr. W., and a report in the case of Mr. T., with evidence.

Ordered, that the said reports be considered to-morrow.

Mr. Moss, from the Legal Education Committee, presented the following report as to regulations for the examinations in the Law School, viz.:

That under the provisions of Rule 145, the following regulations with regard to the Law School examinations for May were adopted, namely:

(1) That no oral examination be held in connection with the ensuing May examinations.

(2) That for these examinations the percentage of marks be 55 per cent.

(3) That the number of questions on each paper for 1st year be ten, and for 2nd year, twelve, and that the same number of questions be given in each honor paper.

(4) That the examiners make their report as to these examinations on or before the second Monday in Easter Term.

The Special Committee on Honors and Scholarships presented a report as follows:

The Committee find that the following candidates, viz.: Messrs. J. H. Denton, W. H. Hunter, and C. W. Kerr, are entitled to be called with honors, and that Messrs. Denton and Hunter are entitled to receive silver medals respectively, and that Mr. Kerr is entitled to receive a bronze medal.

All of which is respectfully submitted.

(Signed) CHARLES MOSS,
J. K. KERR,
B. B. OSLER.

The report was adopted, and ordered accordingly.

The letter of A. D. Crooks was read.

Ordered, that one hundred and forty dollars, deposited by him for the purpose of his bar and solicitor examination, be refunded to him.

The letter of W. S. Gibbon as to A. L. Weed was read.

Ordered, that it be acknowledged, and that Mr. Gibbon be informed that the Law Society is in communication with Mr. Weed on the subject.

The letter of Mr. A. L. Weed was read.

Ordered, that he be informed that there is no special law touching the case of United States' practitioners, and that the law already sent is all that is applicable.

The letter and report of Mr. D. B. Read, Q.C., on the subject of entries of names of Benchers, was read.

Ordered, that the report be referred to a Special Committee composed of Messrs. Ferguson, Mackelcan, Shepley, and Kerr, with instructions to revise the same, to report thereon, and to report on the question of remuneration to Mr. Read.

Mr. Lash, pursuant to notice, moved as follows:

That it is expedient to consent that the Dominion Government have certain privileges over Osgoode Street, in rear of Osgoode Hall grounds, in connection with the drilling of volunteer troops thereon, and that Messrs. Murray, Shepley, Foy, Irving, Robinson, and the mover, be a Special Committee to prepare and submit to the next meeting of Convocation a draft of such agreement and statutes as, after conference with the Government and municipal authorities, they may think should be entered into and passed for the purpose of granting such privilege and protecting the interests of the Law Society.—Carried.

Tuesday, May 20th.

Convocation met.

Present—The Treasurer, and Messrs. Beatty, Bruce, Cameron, Hoskin, Irving, Kerr, Macdougall, McMichael, Martin, Morris, Moss, Murray.

The minutes of last meeting were read and approved.

Mr. Moss, from the Legal Education Committee, presented a report.

In the case of J. Heighington, recommending that he be called to the Bar.

In the case of R. L. Elliott, recommending that he receive a certificate of fitness as a solicitor.

In the case of J. H. McGhie, recommending that he be called to the Bar.

The report was considered, adopted, and ordered accordingly.

The death of Mr. Adam Hudspeth, Q.C., M.P., a Bencher of the Law Society, was announced.

It was then moved by Mr. Cameron, and seconded by Mr. Moss, and unanimously adopted as follows:

That the Benchers of the Law Society in Convocation, desire to express the general feeling of regret at the recent death of Mr. Adam Hudspeth, Q.C., M.P., a member of this body for several years past, and direct that this resolution be entered on the minutes of their proceedings, and that the deep sympathy of Convocation be communicated to the family of their lamented colleague.

Ordered, that a meeting of Benchers be called for Friday, 30th May instant, for the purpose of electing a Bencher to supply the vacancy caused by the death of Mr. Hudspeth, and that the Secretary do issue notices accordingly.

Mr. Martin presented the report of the County Library Aid Committee, and the report of Mr. Winchester, the Inspector of County Libraries.

The above reports were received, read, and adopted, and it was ordered that Mr. Winchester be re-appointed Inspector at a salary of one hundred and fifty dollars a year, and further that a grant to the Leeds and Grenville Association, and the loan to the Essex Association, be made.

Mr. Hoskin, on behalf the Discipline Committee, reported in the case of Thomas A. Gorham, barrister, against Mr. W., barrister, that the complaint in question had not been substantiated, and that the Committee recommend a dismissal of the same.

The report was adopted.

Mr. Hoskin, on behalf of the same committee, reported the case of Mr. T., a member of the Society, at the suit of Messrs. Ashton and Stevenson.

Ordered that the consideration of the report be postponed, to enable the complainants to apply to the Courts to strike Mr. T. off the rolls, and that the solicitor of the Society be instructed to watch the proceedings, and that Mr. Marsh, Q.C., be retained as Counsel to represent the interests of the Society upon such proceedings.

Mr. Moss laid before Convocation the report of the Principal of the Law School, which was received, and it was ordered that the report be printed and distributed to the benchers, and that the report be taken into consideration on Saturday, 7th June, and the benchers be informed.

Mr. Moss submitted a letter addressed to him as Chairman of the Legal Education Committee by Mr. Marsh, with reference to his position, as Lecturer in the Law School, the consideration of which was deferred.

The Secretary reported that Mr. J. S. Walker had completed his service, and was entitled to his Certificate of Fitness.

Ordered accordingly.

Mr. Read, the Solicitor of the Society, announced by letter that the Court of Appeal had dismissed Mr. Macdonnell's appeal, in the case of *Macdonnell* v. *Blake and the Law Society* with costs.

Messrs. Heighington, Barrie, and McGhie, were called to the Bar.

Saturday, 24th May, 1890.

At a meeting of the Law Society, held in Convocation Room, Osgoode Hall, on this day.

Present—Messrs. Moss and Murray.

There being no quorum at 11 a.m., being thirty minutes after time of meeting, the senior barrister present adjourned the meeting to 10:30 a.m., on Friday, 30th May, instant.

(Sd.) CHARLES MOSS,
H. W. M. MURRAY.

Friday, May 30th.

Convocation met.

Present—The Treasurer and Sir Adam Wilson, Messrs. Cameron, Foy, Hoskin, Irving, Kingsmill, McMichael, Mackelcan, Morris, Murray, Shepley, and Smith.

The minutes of the last two meetings were read and approved.

Ordered, that the members of the Bench present be requested to attend H.R.H. the Duke of Connaught during his visit to Osgoode Hall this day, and that Convocation be at the time of the said visit adjourned during pleasure.

Ordered, that Mr. Blake be re-appointed Treasurer for the year.

Ordered, that Mr. A. J. Christie, Q.C., of Ottawa, be elected to fill the vacancy in the Bench caused by the death of Mr. Hudspeth.

Ordered, that the Standing Committees for this year be composed of the same members as last term, save that the name of Mr. Christie be substituted for that of Mr. Hudspeth.

Mr. Morris, from the Legal Education Committee, presented a report on the petition of T. F. Lyall, recommending that the prayer of the petition be not granted. Also, in the cases of W. M. Sutherland and J. H. Denton, recommending that they receive Certificates of Fitness.

The report was received, adopted, and ordered accordingly.

Mr. Shepley, from the Reporting Committee, presented a report, also the Report of the Editor.

Your Committee beg to present the Editor's Report upon the state of the work of reporting, which is herewith laid before Convocation.

Your Committee beg to call attention to the fact that according to the Editor's Report there are at this date unreported cases of the month of April to the number of thirteen, of March to the number of twenty-one, and of February one case.

EDITOR'S REPORT.

Toronto, 23rd May, 1890.

DEAR SIR,—I have to report that there are now in the Court of Appeal, in addition to the judgments of last week, which have yet to be considered, six unreported cases, all of March, which, however, were not given to the reporter until the 8th April. In the Queen's Bench there are three, two of which are of March (ready), and one of April. In the Common Pleas there are seventeen ; fourteen of March, of which seven are revised, and three of April. In the Chancery Division Mr. Lefroy has six ; one of March ready to issue, one of April, and four of May. Mr. Boomer has seven ; one of February ready to issue, four of March, of which one is revised, and two of April. Of the Practice Cases there is one of May, all cases up to the first of that month having been published.

I am yours truly,

(Sd.) J. F. SMITH.

B. B. Osler, Esq., Q.C., *Chairman.*

Ordered, that the Reporting Committee call the attention of the Editor to the arrears with the view of their being brought up in the course of the ensuing month.

Ordered, that the consideration of the report of the Examiners of the Law School do stand till the next meeting of Convocation.

Mr. Murray from the Finance Committee presented a report.

(1) The Finance Committee beg leave to report that they have caused to be prepared a statement of the revenue and expenditure of the Law Society for the year ending 31st December, 1889, and they submit same herewith, together with a statement showing the assets and liabilities as on the 31st day of December, 1889.

(2) That they lately had under consideration the question of insurance, and, after consulting with the architect of the Society, they increased that on the examination and dining halls from $25,000 to $30,000, and that on the remainder of the Law Society building from $15,000 to $25,000.

(3) That in view of the recent fire at the University of Toronto they communicated with the Minister of Public Works, and they believe that further precautions have been taken in that part of the building belonging to the Ontario Government.

They have also approved of a report made by the architect at their request, whereby a better system for a supply of water will be secured in the future. Certain doors and a window between the Law Society and the Government parts of the building will be closed with iron doors, or built up with brick. There will be a fire escape provided from the upper part of the building, a messenger call introduced, hand grenades kept in every room, and the use of coal oil lamps has been forbidden.

(4) They also recommend that the use of the examination hall by the Osgoode Legal and Literary Society be confined to debates.

(5) They have caused an enquiry to be made as to the occupation of the wardrobes used by the members of the Society, and find that of fifty-eight in the Queen's Bench room the occupation of two only is unknown. Of twenty-five in the Common Pleas room only one is unknown; and twenty-five in the Chancery Division, the occupation of only nine is unknown, and they have directed the secretary to put up a further notice that if any wardrobes remain unclaimed on the 15th day of June, the same will be opened and possession thereof resumed by the Society; they also report that they allowed an increase in the wages of caretaker Gilly of $10 a month during the past session of the Law School.

(6) In the matter of Mr. D., a solicitor against whom an order was obtained, suspending him for practising without taking out his annual certificate, your committee report that in consequence of a direction made by the Hon. Chief Justice Sir Thomas Galt, on a motion to commit for disobedience of said the Secretary wrote to Mr. D. informing him that upon payment of his order, fees, without fines or costs, he would receive his reports; that Mr. D. has not paid any fees, and has continued to practice, and is practising as a solicitor, and that the Solicitor of the Society has been instructed to at once proceed against Mr. D. on the said order, and to compel obedience to same.

(7) The Secretary, in pursuance of instructions, has prepared a list of solicitors who are in default, and the Committee submit same herewith for the information of Convocation.

(Sd.) HUSON W. M. MURRAY,
Chairman.

May 30th, 1890.

(Continued in next number.)

Correspondence.

THE LAW SCHOOL.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—When writing on several occasions on this subject I have assumed that the Benchers might come to think differently, or at any rate eventually tire of their white elephant, the Law School. But by the appointment of two more lecturers, and by other vigorous measures, it seems clear that having put their hand to the plough they will not turn back. As nothing will be gained by an iteration of general objections to the existence of a Law School, it becomes a reasonable duty to point out and call for such efficiency as will make its further life desirable and not penal.

To this end two radical changes should, I think, be made in the policy of the Benchers. (1). The stand-and-deliver mode of instruction by lectures should be relegated to a very subordinate place; (2) students should be entirely relieved of the necessity of attendance in chambers; and the School must provide the full equivalent of office instruction. If this cannot be done the Law School will remain mostly a farce, and legal education had better far been left to the Universities.

I see no reason to withdraw what I have said elsewhere, too vigorously, perhaps, of that legal education which consists in nothing more than attenuating what is most usually as clearly expressed in the text-books. Lectures are a survival of the time when professors, not books, were the repositories of knowledge, and they are only in place now-a-days when the warm personal stimulus of the lecturer, and the form of his expression, are of greater concern than the subject matter. In fact, generally, *viva voce* exposition, whether it be the lofty declamation of the orator or the unimpassioned prose of the lecturer, is only useful where the purpose is controversial, and it is sought to excite the prejudices or warp the judgment of an audience.

If this be the whole truth, the mere lecturer should have scant room in a Law School where English law is taught. There is no doubt that a few general lectures by truly great lawyers, holding up high ideals of diligence and honour, would stimulate and profit any student. In this particular case, however, the lecture has a further use, and that is where Canadian law has developed differently from that laid down in our English text-books. Any further use of the lecture may give the Benchers some cause for congratulation; it can never lead to truly valuable results. The great objection to making the lecture the main part of the programme is, that attention can never be kept up, and to the truth of this the past history of legal education will amply testify. To achieve truly valuable results the lecturer (how else shall we call him?) must sit in the midst of his class, and by exercises written and oral he must reach every member of it. But this would necessitate small classes of fifteen or twenty, and accommodation which is not now at the Benchers' disposal. Whether they can supply it or not is not a question here. If they adhere to compulsion their duty is plain.

In England it is a most common expression that a barrister learns his profession in court when a student; yet it was the main defect of the system of legal education which has just been superseded that such could not be said of Ontario barristers. Two causes have combined to produce this result, namely, the necessities of students and the cupidity of solicitors.

It is most seriously to be regretted, that before taking so important a step the Benchers did not devise some means of remedying this defect. As it is the student has been placed in a cross fire. He cannot profit much by attendance in court or chambers, while he is obliged to attend five-sixths of the lectures of the Law School. For this reason, and for the general reason that they have partly undertaken his education, the Benchers should undertake it all. Conveyancing, the drawing of wills, agreements, and other legal documents should be thoroughly taught. Further, the moot court cannot remain the absurdity it is at present. It can only be made an efficient component of legal education by making it provide, as nearly as possible, for the conduct of an action in all its branches.

Compulsion, for its present purposes at least, is wrong, and there is the strongest moral obligation upon the Benchers to provide such instruction as will render compulsion unnecessary. Until they do they will have no flattering success in their new venture.

GORDON WALDRON.

REPORT OF MACMILLAN v. *GRAND TRUNK RAILWAY.*

Editor of THE CANADA LAW JOURNAL:

SIR,—The June number of the *Canadian Law Times* contains an article on the case of the *Grand Trunk Railway Co.* v. *McMillan*, lately decided by the Supreme Court of Canada, and reported in Vol. 16 of the Supreme Court Reports, and the writer, who is evidently the plaintiff's solicitor, so misrepresents the facts of the case and the result of the judgments that in justice to the reporters of the Court, it should not be ollowed to pass unnoticed. The writer may not have intended to misrepresent these matters, but he has done so to such an extent that I think I am justified in saying that if the case was presented to the Court in the manner in which it appears in this article, it is not surprising if the Court did, as the writer alleges, fail to understand it.

The opening clause of the article referred to is misleading as well as grammatically absurd. It is as follows: "The report of this case in the last number of the Supreme Court Reports has recently come to hand, and presents so many features for criticism in respect of both form and substance that we cannot refrain from directing attention to it, and criticising the treatment it has received at the hands of our highest Canadian Court." From the first part of this clause one would suppose that it was the report that was to be the object of the writer's criticism, but it is evident from what he intended to say in the concluding portion as well as from the general tenor of the article that it was the case itself and the manner in which the judges treated it, with which the writer proposed to deal, and that his attack is mainly directed against the Court; there are, however, a few refer-

ences to the work of the reporters, and it is those only which I propose to notice, as I do not consider myself called upon to appear as the defender of the Court, even if such defence were called for.

I will take the points upon which the report is attacked, and deal with them in the order in which they appear in the article. The first is as follows: The writer, after mentioning the fact of an unsuccessful attempt having been made to appeal to the Privy Council in the case, says: "The judgment of the Privy Council, refusing leave to appeal, was delivered more than a year ago, and must have been in the hands of the Supreme Court reporter before the publication of the report in question. Why was it not alluded to?"

The writer is not justified in assuming that the judgment must have been in the hands of the reporter; judgments refusing leave to appeal to the Privy Council are seldom reported and the reporters never receive them, but are obliged to search for material in any case in which they desire to refer to them; but, assuming that the reporters had the material in the present case, what could they have done? The judgments are never published in full; the usual practice is to note at the end of a case that application for leave to appeal has been made to the Privy Council, and allowed or refused, as the case may be. But had such a note appeared at the end of the case of the *Grand Trunk Railway Co.* v. *McMillan*, it would have been misleading, inasmuch as it would have been open to the inference that the judgments of the Supreme Court were approved by the Privy Council, and so it was omitted; but the attempt to appeal will be found noted in the list of appeals to the Privy Council in the front pages of Vol. 16, which will be issued with the last number of the volume.

The next stricture on the report is the following: "The second clause of the head-note asserts, apparently as the decision of the entire Court, that the decision in *Vogel* v. *G.T.R.* does not govern. This, as we have endeavored to show, was not decided either by the Supreme Court or the Court of Appeal." The correctness of this depends on whether the Court of Appeal did or did not so decide. If it did, all the Judges of the Supreme Court held the same, for Mr. Justice Gwynne, with whom Fournier, J., concurred, bases his conclusion that the appeal should be dismissed on the reasons assigned in the Court of Appeal, and, of course, there is no question that the other members of the Supreme Court so decided. Then was the reporter justified in assuming that the Court of Appeal so held? The appellant's counsel in his factum says that they did, and Mr. Justice Strong, after referring to the judgment of the Divisional Court that Vogel's case did govern, says: "I entirely agree with the Court of Appeal that this view is erroneous." Further, an examination of the judgments in the Court of Appeal shows that some of the judges expressly dissented from the view that Vogel's case did govern, and they all base their judgment in favor of the plaintiff on other grounds. It is evident, therefore, that the reporter had good grounds for giving this holding as emanating from the entire Court, and could not have done otherwise if he noticed the point at all.

The next and last objection to the head-note is as to the holding, on a condition of a contract in the case requiring notice of loss of goods to be given within thirty-six hours, which holding is as follows: "*Held*, per Strong, J., that a plea setting up non-compliance with this condition having been demurred to, and the plaintiff not having appealed against the judgment over-ruling the demurrer, the question as to the sufficiency in law of the defence was *res judicata*." As to this

the writer says, "One would gather from this that Strong, J., alone held this opinion; but, as we have seen, Taschereau, J., agreed with the judgment of Strong, J. But curiously enough it so happens, as an examination of the pleadings in the appeal case discloses, *that the plea in question was never demurred to at all.*"

We will first deal with the question of fact contained in the last sentence. The holding is given in almost the exact words used by Mr. Justice Strong in his judgment; so, if the writer is correct, his Lordship has founded that holding upon a state of facts which did not exist. If such were the case, the reporter would be perfectly justified in framing his head-note upon the judgment as it stood, but the fact is that this is one of the instances of the writer's ignorance of his own case, for there can be no doubt that the plea in question was demurred to. The demurrer was to paragraphs four and eight, among others, of the statement of defence, and both these paragraphs set up a breach of this condition; Mr. Justice Strong is perfectly right as to the facts, and they are presented in the same way in the appellant's factum.

Then, as to the objection, which is repeated in another place, that the holding should not have been by Strong, J., alone, but by Strong and Taschereau, JJ. What is the fact as to that? Mr. Justice Taschereau simply says: "I think the appeal should be allowed for the reasons stated in the judgment of Mr. Justice Strong." Is the reporter to assume that Taschereau, J., agrees with everything contained in Judge Strong's judgment? I think the most that can be said is that he concurs in the grounds upon which Judge Strong disposes of the case, and not in any dicta holdings which are not necessary for such disposition. At all events it is a vexed question, and one which I have no doubt is troublesome to all reporters how far the concurrence extends in such cases, and the Supreme Court reporters have always endeavored in such case to avoid the risk of making a judge appear to decide what he may have had no intention of holding. Moreover, why should the writer complain that a holding which he considers wrong, and founded on a misapprehension of facts, is restricted to a single judge? He surely would not wish to multiply error.

The only other point in which the report is attacked is in regard to the statement of facts. I do not propose to notice that, as the objection appears to be that the reporter did not state everything that the writer considers should have appeared; but it must be remembered that the statement of facts is only supposed to contain what is necessary for a proper understanding of what is decided by the judgments, and is not a history of the entire facts of the case.

I venture to assert that if any intelligent lawyer, who has had experience of law reporting, will take the trouble to examine the report of this case, he will come to the conclusion that the severe strictures of the writer are not supported by the facts, and are entirely unwarranted. It would be a hopeless task for reporters to shape their work so as to satisfy unsuccessful litigants or their solicitors who too closely identify themselves with them. The Supreme Court Reports may not be perfect, but the case in question is certainly free from the objections urged against it, and will, I am satisfied, bear any investigation made by a candid and impartial critic. Yours truly,

C. H. MASTERS,
Assistant Reporter, S.C.C.

[We know nothing of the case except what appeared in the report, and in the above letter. Whilst we feel that the reporter is entitled to ample opportunity to answer the strictures contained in the article to which reference is made, yet we are satisfied the solicitor mentioned in the above communication would not knowingly make any misrepresentation or misstatement.—ED. C. L. J.]

DIARY FOR JULY.

1. Tues....Dominion Day. Long vacation begins.
3. Thur....Quebec founded, 1608.
4. Fri .....Declaration of American Independence, 1776.
5. Sat.....Battle of Chippewa, 1814.
6. Sun.....*5th Sunday after Trinity.*
7. Mon.....County Court Sittings for Motions except in York, begin. Col. Simcoe Lieut.-Gov. of Ontario, 1792.
10. Thur ...Christopher Columbus born, 1447.
12. Sat ..... County Ct. Sittings, for Motions, except in York and.
13. Sun.....*6th Sunday after Trinity.* Sir John Robinson, 7th C. J. of Q. B., 1829.
15. Tues....St. Swithin. Manitoba entered Confederation, 1870.
19. Sat.....Quebec capitulated to the British, 1629.
20. Sun.....*7th Sunday after Trinity.*
22. Tues.....W. H. Draper, 9th C. J. of Q. B., 1863. W. B. Richards, 3rd C. J. of C. P., 1861.
23. Wed.....Upper and Lower Canada united, 1840.
24. Thur....Battle of Lundy's Lane, 1814.
25. Fri.....Canada discovered by Cartier, 1534.
27. Sun.....*8th Sunday after Trinity.* Wm. Osgoode, 1st C. J. of Q. B., 1792.
29. Tues.....First Atlantic Cable laid 1866.
30. Wed.....Relief of Derry, 1689.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

[June 12.

SPINNEY *v.* OCEAN MUTUAL INS. CO.

Marine insurance—Delay in prosecuting voyage —Deviation—Increase of risk.

The cargo of a coasting vessel was insured for a voyage from Pubnico, N.S., to Lunenburg or Halifax, the policy containing the usual clause allowing the vessel, in case of extremity, to put into and stay at any port or ports without prejudice to the insurance. The vessel sailed on December 15th, 1886, and on Dec. 21st arrived off Shelburne Harbor and put in there for shelter. The next day she started again, but returned to the harbor, remaining until Dec. 27th, when she went out and again returned. She did not attempt to sail again until Jan. 3rd at midnight and was driven back by a storm, and on Jan. 4th she got out of the harbour, and there being a heavy sea attempted to get back, but got on shore and was wrecked. In an action to recover the insurance, evidence was given by the shipmasters and the log of a Government vessel cruising in the vicinity that the vessel could have proceeded on her voyage several times during the stay in Shelburne, and it was shown that other vessels had put into Shelburne during the same time and had gone to sea again. The Insurance Company pleaded among other pleas barratry and deviation. The trial judge held that the conduct of the master of the insured vessel, there being no satisfactory explanation or excuse offered for his delay, amounted to barratry, and gave judgment for the defendants on that plea. The full court, on appeal, held that barratry was not established, as it depended on the evidence of a witness to whom the trial judge attached no credit, but they sustained the verdict on the ground of deviation.

On appeal to the Supreme Court of Canada

Held, affirming the judgment of the court below (21 N S. Reports 244) that there is an implied condition in a contract of marine insurance, not only that the voyage shall be accomplished in the ordinary track or course of navigation, but that it shall be commenced and completed with all reasonable and ordinary diligence; any unreasonable or unexcused delay, either in commencing or prosecuting the voyage, alters the risk and absolves the underwriter from liability for subsequent loss.

Held, also, that in case of deviation by delay, as in that of departure from the usual course of navigation, it is not necessary to show that the peril has been enhanced in order to avoid the policy.

Appeal dismissed with costs.

Henry, Q.C., and *Bingay* for the appellants.

Borden for the respondents.

[June 12.

FITZRANDOLPH *v.* MUTUAL RELIEF SOCIETY OF NOVA SCOTIA.

Life Insurance—Application for policy—Reference to application in policy—Construction—Warranty—Misstatement.

An application for membership in a mutual insurance society contained a declaration by the applicant warranting the truth of the answers to the questions, and of the statements in such application, and an agreement that if any of the same were not true, full and complete, the bond of membership issued thereon should be void. Among the questions in the applications was one requiring the applicant to

answer "yes" or "no" as to whether he had ever had any of certain diseases named. The list of such diseases was printed in perpendicular columns, and opposite the disease at the head of each column the applicant wrote "no," and underneath it, opposite the other diseases named, placed marks like inverted commas.

On the trial of an action to recover the amount insured by a bond issued in pursuance of this application, it was found as a fact that he applicant had had one of the diseases opposite which the said marks appeared. The bond issued purported to insure the applicant "in consideration of statements made in the application herefor," etc.

Held, affirming the judgment of the Supreme Court of Nova Scotia (21 N. S. Reports 274) that the application was incorporated with the bond and made part of the contract for insurance, and that whether the applicant intended the mark opposite the disease which it was found he had had to mean "no," or intended it as an evasion of the question, the bond was void for breach of the warranty in the application.

Appeal dismissed with costs.

Borden for the appellant.

Henry, Q.C., for the respondent.

[June 12.

THE NORTH SHORE RAILWAY COMPANY *v.* MCWILLIE ET AL.

Railway—Damages caused by sparks from locomotive—Responsibility of Company—R. S.C., c. 109, sec. 27, 51 Vict., c. 29, sec. 287—Limitation of actions for damages.

A railway company by running a heavy train on an up grade when there was a strong wind caused an unusual quantity of sparks to escape from the locomotive, which set fire to a barn situated in close proximity to the railway track.

Held, affirming the judgment of the courts below, that there was sufficient evidence of negligence to make the railway company liable for the damage caused by the fire. Per GWYNNE, J., that the "damage" referred to in sec. 27 of c. 109 R.S.C., and sec. 287 of 51 Vict., c 29, is "damage" done by the railway itself, and not by reason of the default or neglect of the company running the railway or of a company having running powers over it, and therefore the prescription of six months referred to in said sections is not available in an action like the present.

Appeal dismissed with costs.

Brosseau for appellant.

Robinson, Q.C., and *Geoffrion*, Q.C., for respondent.

[June 12.

JONES *v.* FISHER.

Damage to land by construction of dam—Servitude—Arts. 503, 549, C.C., C.S.L.C., c. 51—Improvement of water courses.

Where a proprietor has for the purpose of improving the value of a water power built a dam over a water course running through his property and has not constructed any mill or manufactory in connection with the dam, he cannot, in an action of damages brought by a riparian proprietor whose land has been overflowed by reason of the construction of the dam, justify under the provisions of C.S.L.C. c. 5.

Where the proprietor of a water course raises the level of the water by the construction of a dam so as to overflow the land of other riparian owners, he cannot acquire by possession or prescription a right or title to the maintenance of the dam in question. Arts. 503, 549 C. C

Appeal dismissed with costs.

Laflamme, Q.C., for appellant.

Geoffrion, Q.C., and *Duffy* for respondent.

[June 12.

VENNER *v.* SUN LIFE INSURANCE COMPANY.

Life insurance—Unconditional policy—Misrepresentations—Effect of—Indication of payment—Return of premium—Additional parties to a suit—R.S.C., c. 124 secs. 27 and 28—Arts. 2487, 2488, 2585 C. C.

An unconditional life policy of insurance was issued in favour of a third party, creditor of the assured, "upon the representations, agreements and stipulations" contained in the application for the policy signed by the assured, one of which was that "if any misrepresentation was made by the applicant or untrue answers given by him to the medical examiner of the company then in such a case the premiums paid would become forfeited and the policy be null and void." Upon the death of the assured the person to whom the policy was made payable sued

the company, and at the trial it was proved that the answers given by the applicant as to his health were untrue, the insurer's own medical attendant stating that assured's was a life not insurable.

Held, 1st, that the policy was thereby made void *ab initio*, and the insurer could invoke such nullity against the person in whose favour the policy was made payable and was not obliged to return any part of the premium paid.

2nd. That the statements misrepresented being referred to in express terms in the body of the policy, the provisions of secs. 27 and 28, R. S.C., c. 124, could not be relied on to validate the policy, assuming such enactments to be *intra vires* of the Parliament of Canada, upon which point it was not necessary to decide.

3rd. That the indication by the assured of the person to whom the policy should be paid in case of death, and the consent by the company to pay such person did not effect novation, (Art. 1174 C.C.), and the provisions contained in Art. 1180 C.C. are not applicable in such a case.

It is too late to raise an objection for the first time on the argument before the Supreme Court that the legal representatives of the assured were not made parties to the contestation between the parties in the cause.

Appeal dismissed with costs.

Geoffrion, Q.C., and *Amyot*, Q.C., for appellant.

Langelier, Q.C., for respondent.

[June 12.

CANADA SOUTHERN RAILWAY CO. *v.* JACKSON.

Railway Co.—Negligence—Accident to employee—Performance of duty—Contributory negligence.

J., a switch-tender of the C. S. Ry. Co., was obliged to cross a track in the station yard to get to a switch, and he walked along the ends of the ties which projected some sixteen inches beyond the rails. While doing this an engine came behind him and knocked him down with his arm under the wheels and it was cut off near the shoulder. On the trial of an action against the company in consequence of such injury the jury found that there was negligence in the management of the engine in not ringing the bell and in going faster than the law allowed. They also found that J. could not have avoided the accident by the exercise of reasonable care.

Held, affirming the judgment of the court below, GWYNNE and PATTERSON, JJ., dissenting, that there was no such negligence on J.'s part as would relieve the company from liability for the injury caused by improper conduct of their servants.

Held, per TASCHEREAU and PATTERSON, JJ., that the Workmen's Compensation for Injuries Act of Ontario, 49 Vict., c. 28, applies to the C. S. Ry. Co. notwithstanding it has been brought under the operation of the Government Railways Act of the Dominion.

Appeal dismissed with costs.

Symons for the appellants.

S. H. Blake, Q.C., for the respondent.

[June 12.

CLARKSON *v.* RYAN.

Lien—Costs of execution creditor—Assignment for general benefit of creditors—Construction of Statute 48 Vic., c. 26, s. 9—49 Vic., c. 25, s 2.

48 Vict., c. 26, s. 9 (o). as amended by 49 Vict., c. 25, s. 2 (o), provides that an assignment for the general benefit of creditors has precedence over all executions not completely executed by payment, "subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands."

Held, per RITCHIE, C. J., FOURNIER and TASCHEREAU, JJ., affirming the judgment of the Court of Appeal (16 Ont. App. R. 311) that the lien referred to in this section attaches to the full costs of the action of the execution creditor against the insolvent debtor.

Held, per GWYNNE and PATTERSON, J.J., dissenting, that such lien is only for the costs of issuing execution and sheriff's fees, etc., incurred in executing the same.

The Statute of Ontario requiring special leave to appeal to the Supreme Court in cases where the amount in controversy is under $1,000 (s. 43, Jud. Act, 1881), is *ultra vires* of the legislature of Ontario and not binding on the Supreme Court.

The Court of Appeal cannot impose upon a suitor conditions upon which he shall be allowed to appeal to this Court.

Appeal dsmissed with costs.

Foy, Q.C., for the appellant.

Aylesworth for the respondent.

[June 12.

SHOOLBRED *v.* CLARK.

Winding-up Act—R.S.C., c. 129—Application of to Provincial Company—Winding-up proceedings—Reference to master.

The Union Fire Insurance Co. was incorporated by the Ontario Legislature, and having become insolvent an assignee was appointed to settle its affairs under the Insolvent Act of 1875. When the Winding-up Act was passed a petition was presented to the Court to have the company wound up under its provisions and a winding-up order was made which was set aside by the Supreme Court of Canada (14 Can., S.C. R. 642). A second winding-up order having been made and confirmed by the Court of Appeal, a second appeal was had to the Supreme Court by S., a shareholder.

Held, affirming the judgment of the Court of Appeal (16 Ont. App. R., 161) and that of the Chancellor (14 O. R., 618) that notwithstanding the company was incorporated by the Provincial Legislature, it could be put into compulsory liquidation and wound up under the Dominion Winding-up Act, R.S.C., c. 129.

Held, also, that the powers assigned to Provincial Courts or judges by the Winding-up Act are to be exercised by means of the ordinary machinery of the courts and their ordinary procedure. It was therefore no ground of objection to the winding-up order in this case that it was referred to a Master to settle the security to be given by the liquidator appointed therein.

Appeal dismissed with costs.

S. H. Blake, Q.C. and *McLean* for the appellant.

Bain, Q.C., for the respondents.

[June 12.

TURNER *v.* PREVOST.

Statute of frauds—Contract relating to interest in land—Part performance.

B., a resident of British Columbia, wrote to his sister in England that he would like one of her children to come out to him, and in a second letter he said, "I want to get some relation here, for what property I have, in case of sudden death, would be eat up by outsiders and my relations would get nothing." On hearing the contents of these letters, T., a son of B.'s sister and a coal miner in England, came to British Columbia and lived with B. for six years. All that time he worked on B.'s farm and received a share of the profits. After that he went to work in a coal mine, Idaho. While there he received a letter from B. containing the following:—"I want you to come at once as I am very bad. I really do not know if I shall get over it or not and you had better hurry up and come to me at once, for I want you and I dare say you will guess the reason why. If anything should happen to me you are the person who should be here." On receipt of this letter T. immediately started for the farm, but B. had died and was buried before he reached it. After his return he received the following telegram which had not reached him before he left for home: "Come at once if you wish to see me alive, property is yours, answer immediately. (Sgd.) B." Under these circumstances T. claimed the farm and stock of B., and brought an alleged agreement by B. that the same should belong to him at B.'s death.

Held, affirming the judgment of the Court below, that as there was no agreement in writing for the transfer of the property to T., and the facts shown were not sufficient to constitute a part performance of such agreement, the fourth section of the Statute of Frauds was not complied with and no performance of the contract could be decreed.

Appeal dismissed with costs.

S. H. Blake, Q.C., for the appellant.

Moss, Q.C., for respondent Power.

McCarthy, Q.C., and *A. F. McIntyre* for other respondents.

[June 13.

POWER *v.* MEAGHER.

Trustees—Commission to—Rule of Law.

Prior to the passing of the Nova Scotia Statute 51 Vict. c. 11. sec. 69, there was no statutory authority for trustees to receive commission for their services when none was provided for by the instrument creating the trust. In a case which did not come within the statute

Held, reversing the judgment of the Supreme Court of Nova Scotia (21 N. S. Reports, 184), that the English rule of law prohibiting such

commission was applicable to and in force in that Province.

Appeal allowed with costs.

Hon. L. G. Power appellant, in person.

Henry, Q.C., for the respondent.

[June 13.

DUGGAN *v.* DUGGAN.

Will—Legacy under—Contingent interest—Protection against waste.

The will of J. D. contained a bequest to any child or children of a deceased brother of the testator who should be living at the death of the testator's wife. P. D. was the only son of such deceased brother, and during the life time of the widow he brought suit to have his legacy protected against dissipation of the estate.

Held, reversing the judgment of the court below, that P. D. had more than a possibility or expectation of a future interest ; that he had an existing contingent interest in the estate, and was entitled to have the property preserved so that his legacy could be paid in the event of the interest becoming vested.

Appeal allowed with costs.

E. L. Newcombe for the appellant.

Borden for the respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

BOYD, C.] June 4.

WESTERN ASSURANCE CO. *v.* ONTARIO COAL COMPANY.

Maritime law—General average contribution—Attempt to rescue vessel and cargo—Common danger—Average bond—Adjustment—Expenditure—Liability of owners of cargo.

A vessel loaded with coal stranded under stress of weather, and was abandoned as a total loss to the underwriters, the plaintiffs. The owners of the cargo, the defendants, proposed to unload at their own expense, but the plaintiffs refused to allow this and told the defendants that they could not get the cargo without signing an average bond. Upon this the defendants signed a bond which was *ex facie* imperfect, and the plaintiffs took steps to save vessel and cargo by one expedition. They failed to rescue the vessel, but saved the larger part of the cargo. They now claimed upon adjustment contribution from the defendants for the expenditure incurred, which was in excess of the value of the salvage.

Held, that the vessel and her cargo were not when stranded in a common danger, and the expenditure was not for the preservation and safety of both ship and cargo, but for the deliverance of the vessel alone ; that the average bond signed did not bind the defendants to pay more than they were rightfully liable to pay, and the adjustment was no obstacle to the determination of the real liability, and that the defendants were liable only to pay what they would have paid to recover the cargo by their own exertions.

Osler, Q.C., for plaintiffs.

Delamere, Q.C., and *T. Urquhart* for defendants.

BOYD, C.] [June 4.

CUMMING *v.* LANDED BANKING & LOAN CO.

Trusts and trustees—Breaches of trust—Taking securities in name of one of two joint trustees—Pledging securities for advance—Misapplication of moneys advanced—Following securities in hands of pledgee.

W., one of two joint trustees, assumed to lend trust moneys on the security of mortgages on land, taking the mortgages to himself alone as trustee of the estate and effects of J. C., deceased. These mortgages were hypothecated by W. to the defendants, and moneys were advanced to him by the defendants, ostensibly to meet an unexpected call by one of the beneficiaries ; but the moneys were not so applied, nor otherwise for the benefit of the estate, and they were not required for any such purposes under the terms of the will creating the trust.

In an action by the other trustee and two new trustees, who were also beneficiaries, appointed in the stead of W :

Held, that W. had been guilty of two breaches of trust, and that the plaintiffs were entitled to follow the trust-securities and to make the defendants account for all moneys received by them thereunder.

Marsh, Q.C., for the plaintiffs.

S. H. Blake, Q.C., and *Mackelcan*, Q.C., for the defendants.

BOYD, C.] [June 4.

CANN *v.* KNOTT.

Free grants and homesteads—Exemption from execution—Interest of original locatee as mortgagee after alienation.

The defendant was locatee of certain land under the Free Grants and Homesteads Act, R.S.O., c. 25, and duly obtained patents therefor. Afterwards he and his wife sold and conveyed parts of the land, taking back mortgages to secure the purchase money.

Held, that the mortgages were not interests in the land exempt from levy under execution within the meaning of s. 20, s-s. 2.

The exemption extends to the land or any part thereof or interest therein, so long as it is held by the original location title, whether before or after patent; but where there has been a valid alienation, a mortgage taken by the original locatee does not vest in him qua locatee. Moreover, the word "interest," used in the subsection, does not extend to the chattel interest of a mortgagee.

D. Urquhart for the plaintiff.

Foy, Q.C., for defendants.

Div'l Ct.] [June 6.

MCCRANEY *v.* MCCOOL.

Partnership—Dissolution—Pending contract.

The defendants contracted to deliver lumber to a firm of three partners. Before delivery the firm was dissolved, and the defendants refused to carry out their contract.

In an action brought in the individual names of the three partners for damages for non-delivery,

Held, that the dissolution of the firm was no justification in law for the defendants' refusal to carry out their contract.

Fullerton, Q.C., for plaintiffs.

M. J. Forman for defendants.

Chancery Division.

BOYD, C.] [June 6.

MACKLEM *v.* MACKLEM ET AL.

Will—Devise—Forfeiture—Actual possession and occupation—Possession by servant, caretaker, or worker on shares.

S. M. had become entitled under T. C. S.'s will to certain property called "Clark Hill," of which T. C. S. was owner when he died, and also to an undivided interest in certain other property of which T. C. S. was tenant in common with others. He also became entitled to a legacy under the following clause of A. H. S.'s will: "I will and direct that so soon as S. M. * * can and does take actual possession of the real estate and property * * under the will of T. C. S. * * my executors shall * * so long as he remains the owner and actual occupant of the said real estate pay over to him * * the annual sum of $2,000 to enable," etc.

Held, that this clause read in connection with the will of T. C. S., referred only to the land of which T. C. S. was absolute owner and not to the land he owned as tenant in common.

Held, also, that actual possession and occupation as to the land is consonant with and satisfied by the possession of a servant or caretaker or even a worker on shares.

F. Hodgins for plaintiff.

Robinson, Q.C., for S. Macklem.

Moss, Q.C., and *Bruce*, Q.C., for Mrs. Fuller and assignees.

Bicknell for D. C. Plumb, Executor of J. B. Plumb.

O. Macklem for Mrs. Becher, and Executors of Julia A. Macklem.

Div'l Ct.] [June 9.

WHITE *v.* TOMALIN.

Sale of goods—Agreement in writing—Offer—Statute of Frauds—Evidence.

In an action for specific performance of an alleged agreement worded as follows: "I hereby agree to sell my stock of * * * and agree to take in payment for said stock * * one hundred acres of land being * * (terms set out) and signed J. T. (defendant) and F. B. McM. (assignor to plaintiff)," it was

Held (affirming FALCONBRIDGE, J.) that the document was not an agreement in writing sufficient to satisfy the Statute of Frauds but a mere offer or proposal to sell.

It was shown that an acceptance worded "I hereby agree to purchase the above mentioned stock in the terms aforesaid and to convey the land intended to be taken in exchange," was subsequently added and signed by F. B. McM.

Held, that the offer originally vague and indefinite could not be made certain in that way, for any other person as well as McM. could have with as much reason appended a similar acceptance.

Held, also, that from the frame of the offer one could not know to whom it was made without parol evidence to supplement the writing, which could not be given to supply information in that regard.

Aytoun Finlay and *Schoff* for the plaintiff.

Bain, Q.C., and *Beynon*, Q.C., for the defendant.

Div'l Ct.] [June 9.

PHELPS & CO. *v.* THE ST. CATHARINES AND NIAGARA CENTRAL R. W. CO.

Railways and Railway Companies—Bondholders rights in respect to property of Railway Companies—Judgment creditors right to attach the Company's money on deposit in a Bank—Appointment of Receiver—Remedy.

On an appeal from the judgment of BOYD, C., reported 18 O. R. 581, it was

Held, (reversing BOYD, C.), that so long as a Railway Company is a going concern, bondholders have no right, even though interest on their bonds be overdue and unpaid, to seize or take or sell or foreclose any part of the property of the Company by virtue of their mortgage bonds, and that their remedy is the appointment of a receiver, and that the bondholders in this case were not entitled to the money in question.

Collier for the judgment creditors.

Hoyles, Q.C., and *Ingersoll* for the bondholders.

Practice.

STREET, J.] [Dec. 23, 1889.

IN RE. SWEETMAN AND TOWNSHIP OF GOSFIELD.

Municipal drainage by-law—Motion to quash—R.S.O., c. 184, ss. 571, 572, construction of—Time—Service of notice of motion and filing affidavits.

A municipal drainage by-law was passed on the 1st November, 1889, and on the 12th December, 1889, notice of a motion to the Court for an order quashing it, was served upon the municipal corporation, and affidavits in support of the motion were filed. The notice was for Friday, the 20th Dec.

Held, that the meaning of s. 572 of R.S.O., c. 184, is that in case the application to quash is not made within six weeks, prescribed by s. 571; the by-law shall be valid; and that the service of the notice and the filing of the affidavits within the six weeks was a sufficient making of the application.

Langton for the applicant.

W. H. Blake for the township.

FERGUSON, J.] [May 31.

WALLBRIDGE *v.* GAUJOT.

Costs—Third party—Defending action.

In an action for rent or royalties upon iron received by the defendants, the defendants served a notice upon a third party, claiming contribution from him. The third party appeared; and an order was made that he should be at liberty to defend the action as regarded the questions between the plaintiff and the defendants only, and to appear at the trial, call witnesses cross-examine the witnesses called by the plaintiff and defendants, and be bound by the findings. The third party delivered a statement of defence, which was directly against the plaintiff's statement of claim, except a portion thereof, which stated that he was not a proper party, and that no right of contribution existed against him, but this portion was struck out at the trial upon his own application. The plaintiff was successful in the action.

Held, that the third party had adopted the position of one who was called upon by his own interest to defend the action, and that he should not recover from the defendants who brought him in his costs of so defending it.

W. Cassels, Q.C., for the defendant, Palmer.

W. M. Douglas for the third party.

Chy. Div'l Ct.] [June 16.

LEACH *v.* GRAND TRUNK R.W. CO.

Discovery—Examination of officer of railway company—Driver of "light engine"—New evidence on appeal—Rule 585—Leave to appeal—Delay.

A rule of the defendant company provided that the driver in charge of a "light engine"

has all the responsibilities of a conductor in cases where a train of cars is attached to the engine.

Held, that the driver of a light engine which knocked down and killed the man for whose death the action was brought, was an officer of the company who could be examined for discovery under Rule 487.

Knight v. *Grand Trunk Railway Co.*, 13 P.R., 386, distinguished.

New evidence was allowed to be used upon appeal under Rule 585, and the decision of FERGUSON, J., 13 P.R., 388, was reversed thereupon. The discovery of the new evidence, after a sitting of the Divisional Court had passed, was received as an excuse for delay.

J W. McCullough for plaintiff.

D. Armour for defendants.

FERGUSON, J.] [July 4.

MILLER *v.* SPENCER.

Long vacation—Settling minutes of judgment.

A direction to the Registrar to settle in long vacation the minutes of a judgment pronounced on 30th June was refused.

W. H. Blake for plaintiff.

Q.B.D. Ct.] [June 27.

IN RE SMITH AND THE CITY OF TORONTO.

Costs—Arbitration—Powers of Arbitrators—35 Vict., c. 79—R.S.O., c. 184, ss. 483, 399—Duty of taxing officer.

By 35 Vict., c. 79, the waterworks commissioners of the City of Toronto were authorized to expropriate lands for the purposes of waterworks, and in case of disagreement to have the value ascertained by arbitration; and by 41 Vict., c. 41, all the powers of the commissioners were vested in the city corporation.

The city corporation, desiring to expropriate certain land for waterworks purposes, passed a by-law reciting the above enactments and authorizing the expropriation, and afterwards served a notice offering to pay the land-owner $25,000, and, in the event of his not accepting, requiring him "pursuant to s. 393 of the Municipal Act" to appoint an arbitrator. The arbitrators appointed took the oath prescribed by the Municipal Act, which was different in substance from that prescribed by 35 Vict., c. 79.

Held that s. 483 of the Municipal Act, R.S.O., c. 184, had the effect of superseding the procedure for arbitration provided by 35 Vict., c. 79, and of substituting therefor the procedure for arbitration provided by the Municipal Act; and that the city corporation, having adopted and taken advantage of the procedure provided by the Municipal Act, could not escape the consequences, and therefor the arbitrators had power under s. 399 of the Municipal Act to award costs to the land-owner, there being no power to do so under 35 Vict., c. 79.

Semble, also, that the arbitrators having awarded costs, and their award not having been moved against, it was the duty of the taxing officer to tax the costs.

H. S. Osler for the land-owner.

Biggar, Q.C., for the City of Toronto.

Law Society of Upper Canada.

LAW SCHOOL—HILARY TERM, 1890.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in hte Law School.

CURRICULUM OF THE LAW SCHOOL.

Principal, W. A. REEVE, Q.C.

Lecturers, E. D. ARMOUR. A. H. MARSH, LL.B.

Examiners, R. E. KINGSFORD, LL.B. P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto, are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1890, fourteen Scholarships in all will be offered for competition, seven for those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School:

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum:

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.

Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.

Hawkins on Wills.

Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.

Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.

Pmith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.

Smith's Mercantile Law.

Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively. On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be deliver d by a lecturer.

SPECIAL NOTICE.—Petition for Certificate of Fitness, Certificates of Service, Affidavit of Service, Articles of Clerkship, and assignments (if any) must be filed with the Secretary on or before the third Saturday before Term. The fees are payable at the same time. (L. S. Rule 188). Each affidavit of execution must state the date of execution of the articles or assignments. (R. S. O. 1887, ch. 147, sec. 5, ss. 1.

Notice for Call to the Bar must be filed with the Secretary on or before the fourth Monday before Term.

Petition for Call, Bond, Schedules A and B, and Presentation notice must be filed with the Secretary on or before the third Saturday before Term. The fees are payable at the same time.

The candidate is particularly requested to see that his papers for Call and Solicitor Examination are regular before the first day of Term.

J. H. ESTEN,
Sec. L. S.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for the weeks ending June 14th and 21st contain The Prussian Monarchy and the Revolution of 1848, by Sir Rowland Blennerhassett, *Blackwood's Magazine;* The Colonel's Boy, *Cornhill;* The Comte de Clermont, *Nineteenth Century;* Out of the Deeps, *Temple Bar;* A Quiet Corner of Normandy, *Murray's Magazine;* A Girl's Religion, *Longman's Magazine;* Maurice de Saxe, *Temple Bar;* Mountain Sheep, *Gentleman's Magazine;* The Cry of the Parents, *Macmillan;* Insect Communists, *National Review;* Rathillet, *Blackwood;* Robert Browning, *Quarterly;* Dr. John Covel's Diary, *Gentleman's Magazine;* Poor Mrs. Carrington, *Temple Bar;* Newfoundland the French Fishery Question, *National Review;* The "Gold Fever" in Madagascar, *Standard;* and poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

The Canada Law Journal.

VOL. XXVI. AUGUST 16, 1890. No. 13.

The following announcement has been made with regard to the dates of the Law Examinations of Law Society, Trinity Term: 1st Intermediate, Aug. 26th; 2nd Intermediate, Aug. 28th; Solicitor, Sept. 2nd; Barrister, Sept. 3rd; Orals, Sept. 4th; Law School, 1st Year, Sept. 1st; 2nd Year, Sept. 5th. Last day for filing notices for call and admission as students, August 11th. Last day for filing papers and paying fees for Final Examinations, August 23rd. Term begins on Monday, September 8th.

THE recent case of *Cameron* v. *Walker*, 19 Ont., 212, reveals a somewhat curious state of the law in regard to the operation of the Statute of Limitations. The facts of the case were as follows: The property in question was owned by Mrs. Gardiner, a married woman. In 1869 her husband put the defendant in possession, and he continued in possession ever since without paying rent, or acknowledging title in any other person. In 1881, Mrs. Gardiner gave a mortgage on the lot containing a power of sale, and the plaintiff in the action claimed title under a sale had under this power. The Court held that Mrs. Gardiner (being a married woman) was not prejudiced by the possession of the defendant from 1869 to 1876; but that on 1st July, 1876, under the operation of 36 Vict., c. 16, ss. 1, 5, 16 (O.), the disability to sue, by reason of coverture, was removed, and it was consequently not till then that the Statute of Limitations began to run in the defendant's favor as against her. Consequently when the mortgage of 1881 was given, the defendant had not acquired a title by possession as against her. And the effect of the giving the mortgage, the Court held, was practically to create a new starting point for the Statute in favor of the mortgagee, whose right of action did not accrue until default had been made in the payment of his mortgage. The result was, that although the defendant had twenty-one years' undisturbed possession without having given any acknowledgment of title to any other person, he nevertheless failed to acquire a title under the Statute, as against the mortgagee's vendee. This is certainly a somewhat curious result, seeing that, as against the mortgagor, the defendant had acquired a good title. The effect of the decision is practically to enable an owner of the paper title indefinitely to postpone the operation of the Statute—for if the time for payment of the mortgage is fixed a hundred years hence, and interest is regularly paid in the mean-

time to the mortgagee, his right to bring an action would not accrue until the 100 years were up, and no one in the meantime could as against him acquire a title by possession. This, of course, is an extreme case, but serves to show the possibilities of the law.

IT has been a favorite argument with the advocates of the Torrens' system of registration of title, that the conveyance of land is thereby made as safe and expeditious as the transfer of a share in a company. But the fancied ease and security supposed to attend the dealing in shares of companies is, perhaps, not so real as was supposed. So far as the actual operation of transfer is concerned it is easy enough; but if the recent decision of Mr. Justice Street, in *Duggan* v. *The London and Canadian Loan and Agency Company*, 19 Ont., 272, is a sound exposition of the law, the operation is by no neans as safe as has been supposed. In that case it has been held that a transferee of stock, held "in trust," though no specific trust is mentioned or referred to, has, nevertheless, constructive notice of the trust, whatever it may be, and is put upon inquiry to ascertain its terms, and, neglecting to do so, is responsible to the *cestui que trust* for the due execution of the trust. We believe that the introduction of the words, "in trust" into share certificates has been customary, not with the view of limiting the power of the holder of the certificate in dealing with the shares, but principally for the purpose of protecting the holder from personal liability as a shareholder, and we think it has been somewhat of a surprise, both to the public and the profession, to learn that the words "in trust" have the effect which Mr. Justice Street has attributed to them. The prevailing impression hitherto has been, that the holder "in trust," having the legal title to the shares, is able to make a good and valid transfer of them, and that the transferee is under no obligation to inquire into the trust, or the powers of the trustee, and in the event of any breach of duty on the part of the trustee, the *cestui que trust* had to look to the defaulting trustee, and not to his transferee, for relief. But Mr. Justice Street's decision has given a rude shock to all such theories as to the relative rights of the parties, and it will hardly be safe in the future to purchase shares without the intervention of a solicitor. The doctrine of constructive notice is one that has been the fruitful cause in the past of much injustice, and we do not think it one that it is desirable should be extended into new fields. The case before Mr. Justice Street was one of first impression, and determined on general principles, and we think it would not be a subject for any regret if, on appeal, a different conclusion should be arrived at. At the same time, we fear that the drift of authority is rather in favor of the view taken by the learned Judge. To use the language of Cotton, L.J., in *Williams* v. *Colonial Bank*, 38 Chy.D., 399, "if parties will, without inquiry, take documents which have on their face anything to put the takers on inquiry, they take them at their own risk; and if those from whom they take the documents have not a good title which they can transfer, then the transferors do not acquire a good title, although at the time when they take the documents, they do not in fact know of the real title of those who now assert it." That language was used

in a case where the transferors fraudulently assumed to have a title which they had not. Here the case is somewhat different, as the transferors had undoubtedly a legal title which they could confer, and the only question is whether the transferee is affected by notice of some collateral equity affecting the legal title.

COMMENTS ON CURRENT ENGLISH DECISIONS.

WILL—TESTAMENTARY PAPER EXECUTED "NOT AS A LEGAL WILL BUT AS A GUIDE."

Ferguson-Davie v. *Ferguson-Davie*, 15 P.D., 109, is a case in which a document duly executed as, and purporting to be, a will, but which was prefaced with the words, "This is not meant as a legal will, but as a guide," was held in consequence of these words to be no will, and probate was refused.

WILL—REVOCATION BY MARRIAGE—EXECUTION OF POWER OF APPOINTMENT—WILLS ACT (1 VICT. C, 26) S. 18—(R.S.O., C. 109, S. 20)—LIMITED PROBATE.

In re Russell, 15 P.D., 111, a testator having a power of appointment over certain property which, in default of appointment, was to be divided among his brother and sisters, executed a will whereby he bequeathed all the real and personal estate to which he might be entitled at the time of his death, or over which he had power of appointment, to Julia Smith, and appointed her his sole executrix. He subsequently married her, and died without making any other will. It was held by Butt, J., that so much of the will as was in execution of the power was within the exception of the Wills Act, s. 18 (R.S.O., c. 109, s. 20), and was not revoked by the marriage, and administration with the will annexed was granted to the widow, limited to the property over which the testator had a power of appointment.

ADMINISTRATION—NO KNOWN RELATIVES OF DECEASED—GRANT TO CREDITOR.

In the goods of Ashley, 15 P.D., 120, a grant of administration *ad colligendum* was made to a creditor of a deceased person, on an affidavit that deceased had no known relatives, and was believed to have died a widow.

ADMINISTRATION—COSTS—INDEMNITY AGAINST COSTS—LIQUIDATOR.

In re Blundell, Blundell v. *Blundell*, 44 Chy.D., 1, was an administration action, the conduct of which was given to a joint stock company who were creditors. The company, with the leave of the judge, made an application against a firm of solicitors to compel them to refund certain moneys which had been paid them for costs. The application was dismissed, and the company was ordered to pay the firm's costs. The company was afterwards wound up by the Court and could not pay anything. All the costs of the administration had been paid, except the costs of the application against the firm, but there remained in Court to the credit of the action a sum sufficient to pay either the costs of the company or the costs of the firm in relation to the application. North, J., was of opinion that the liquidator of the company had the better right to the money in Court;

but the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) were agreed that the firm to whom the company had been ordered to pay costs had a better equity, and the fund was accordingly ordered to be paid to the solicitors.

EASEMENT—EXCLUSIVE USE OF GATEWAY—ABSOLUTE OWNERSHIP.

Reilly v. *Booth*, 44 Chy.D., 12, the plaintiff claimed to restrain the defendant in the use of a covered gateway under the following circumstances. M. and others were owners in fee of a house fronting on a street, and also of a yard and premises in rear of the house. The covered gateway in question led from the street through the house to the premises in the rear. They conveyed the premises in the rear, "together with the exclusive use of the gateway," which was described by its dimensions, to one Wimbush in fee, who subsequently leased them to the defendant. The plaintiff subsequently became lessee of the houses, and claimed a declaration that the defendant was not entitled to use the covered gateway otherwise than in exercise of a right of way. The acts complained of by the plaintiff were fixing a transparency over the gateway, lighted by gas lights, and leaning against the plaintiff's house and advertising the objects of the Salvation Army, and the placing of a book stand at the entrance of the gateway where books and tracts were sold; and in short the converting the gateway into a room and using it as a room or shop and not as a passage way, but as if it was his own. Kekewich, J., held that the defendant was entitled so to use the gateway, and on appeal to the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), on the defendant's counsel undertaking that the screws, whereby the transparency objected to was fixed to the plaintiff's house, should be removed, affirmed the decision of Kekewich, J., that under the conveyance to Wimbush the absolute ownership of the gateway passed, and that the defendant, as his lessee, was within his rights in his mode of using it, notwithstanding that beneath the gateway was a vault, and above it a part of the house which had not been conveyed.

DONATIO MORTIS CAUSA—BANKERS' DEPOSIT NOTE—CHEQUE INDORSED ON DEPOSIT NOTE.

In re Dillon Duffin v. *Duffin*, 44 Chy.D., 76, the law of *donatio mortis causa* was in question. The subject of the gift in this case was a bankers' deposit receipt, on which was indorsed a cheque for the amount of the receipt which the deceased filled up, payable to "self or bearer," signed and handed to the donee, and telling her that he was going to give it her conditionally, and that it was to be given back if he recovered, but if not "you are all right." The authorities were not clear that a deposit receipt might be the subject of a *donatio mortis causa;* and *In re Mead*, 15 Chy.D., 657, it was claimed, had decided that a cheque could not be the subject of a *donatio mortis causa* because it was revoked by the death of the drawer. A point was also made that the donee's evidence was uncorroborated. The Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) were of opinion that, on principle, a deposit receipt might be the subject of a *donatio mortis causa*, and that that was substantially what was intended to be given by the deceased, and that the fact that a cheque was indorsed on it did not prejudice the gift, but that the

signing of the cheque was a circumstance which corroborated the evidence of the donee, if corroboration were necessary, which they denied. We may remark that it has been laid down in Ontario that our statute (R.S.O., c. 61, s. 10) requiring that claims against a deceased person's estate should be corroborated is merely declaratory of what the law was before the passing of the statute (see *Orr* v. *Orr*, 21 Gr., p. 409, per Draper, C.J.), but this view is not borne out by the present case, in which Cotton, L.J., states (p. 80) that it is not the law in England (where no similar statute to our Provincial Act exists) that the Court will not establish a claim against the estate of a deceased person on the evidence of a claimant alone, unless it is corroborated. The decision of Kekewich, J., was therefore affirmed. See *Greenwood* v. *Croome*, recently decided by the Divisional Court of the Chancery Division, but not yet reported.

PERPETUITY—REMOTENESS—POSSIBILITY ON A POSSIBILITY—LEGAL LIMITATION OF ESTATE.

Whitby v. *Mitchell*, 44 Chy.D., 85, which was an appeal from a decision of Kay, J. (42 Chy.D., 494), noted *ante* p. 42, reveals the existence of a good deal of divergence of opinion on a point of real property law, viz., as to whether the old rule of law which prohibited the limitation of a legal estate upon a double possibility was or was not obsolete and superseded by the more modern rule against perpetuities, which prohibits property being tied up for a longer period than a life or lives in being, and 21 years afterwards. Mr. Joshua Williams Butler in his notes to Fearn, and Burton maintain that the old rule is still in force, but Lewin, Jarman, Tudor, and Davidson, all take the view that it is obsolete, and Lord St. Leonards himself was cited as having expressed opinions both ways. Kay, J., adopted the opinion of Joshua Williams, and his judgment was affirmed by the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.).

LUNATIC—NECESSARIES—IMPLIED OBLIGATION TO PAY FOR NECESSARIES—DEBT—RIGHT TO RECOVER FOR NECESSARIES AGAINST ESTATE OF LUNATIC.

In re Rhodes, *Rhodes* v. *Rhodes*, 44 Chy.D., 94, shows that the mere fact that necessaries are supplied for the maintenance of a lunatic, not so found, is not sufficient to create an implied obligation to pay for them, but that the Court will look at all the circumstances, and if they lead to the conclusion that the maintenance was furnished from motives of bounty and without any intention of creating a debt, the Court will not in such a case impute any implied contract to pay for them. In the present case a lunatic, not so found, whose income was £96 per annum, was confined from 1855 until her death in 1881 in a private lunatic asylum at a cost of £140 a year. Her brother received the lunatic's income, applied it towards her support, and paid the rest out of his own pocket until his death in 1875. After his death his son, who was his executor, continued to receive and apply the lunatic's income in the same manner, and the deficiency was made good partly by himself and partly by his brother and sisters. No claim was ever made in the lunatic's lifetime against her estate, nor did any of them appear to have kept any account against her. Under these dircumstances the

Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) affirming Kay, J., held that her estate after her death was not liable for the deficiency which had been paid by her brother and his children.

AFFIDAVITS—DUTY OF COMMISSIONERS.

Bourke v. *Davis*, 44 Chy.D., 126, may be referred to for the observations of Kay, J., on the duty of Commissioners in taking affidavits, according to which it would seem that the procedure which used to be indicated by the old Chancery jurat (which, it may be remembered, used to comprise a statement that the affidavit had been read over to the deponent, and that he had been informed that he was liable to be cross-examined as to its contents, and was at liberty to add to or vary the same) ought still to be observed. But so long as 20c. fee is all that is allowed for administering an oath, it is useless to expect Commissioners to do more for the money than they generally do at present.

PRACTICE—OFFICIAL REFEREE—REFERENCE TO TAKE ACCOUNTS—PROCEDURE BEFORE REFEREE.

In re Taylor, Turpin v. *Pain*, 44 Chy.D., 128, Chitty, J., held that where an action is referred to an official referee to take accounts he is not compelled to pursue the strict method followed upon a reference to a Chief Clerk. Our Rules would, however, appear to indicate that the procedure before a referee is to be similar to that before a Master (see Ont. Rule 43).

COMPANY—WINDING UP—TWO PETITIONS—COSTS.

In re Building Societies' Trust, 44 Chy.D., 140, Chitty, J., decided that where two petitions are presented for winding up an insolvent company, they will, in the absence of *mala fides*, take priority in the order they are presented to the Court, and not according to the dates of the advertisements. While the order was made upon the petition first presented, costs of the second petition were allowed against the estate up to the time the petitioner knew of the first petition.

LANDLORD AND TENANT—ASSIGNMENT OF PART—SUB-LEASE OF PART—RIGHT OF CONTRIBUTION.

Johnson v. *Wild*, 44 Chy.D., 146, is a decision of Chitty, J., which may be good law, but nevertheless is a hard case as far as the merits are concerned. The facts were as follows: Minor being lessee of certain lands assigned part of them to the plaintiff, and sub-let another part to the defendant at apportioned rents. He covenanted with his assignee and sub-lessee respectively to pay the rent due to his lessor, and indemnify them against any liability therefor. Minor became insolvent, and under threat of distress the plaintiff paid the whole rent under the original lease, and brought the present action claiming contribution from the defendant. Chitty, J., decided that the plaintiff was not entitled to relief, because, though the plaintiff as assignee was liable to the original lessor, the defendant as sub-lessee was not liable, and therefore the parties were not liable to a common demand, and therefore there was no right of contribution.

WILL—CONSTRUCTION—VESTING—"FROM AND AFTER."

In re Jobson, Jobson v. *Richardson*, 44 Chy.D., 154, is a decision of North, J., upon the construction of a will whereby a testator gave a house to his trustees upon trust, to permit his daughter to receive the rents thereof for life, "and from and after her decease the same premises shall be in trust for all the children of E. in equal shares as tenants in common, on their respectively attaining the age of twenty-one years." There was no direction as to the application of the rents of the property after the death of the tenant during the infancy of the children. The question was whether the words "from and after" had the effect of giving the children a vested estate before attaining twenty-one, and North, J., distinguishing the case from *Andrew* v. *Andrew*, 1 Chy.D., 410, held that it did not, but that the interests of the children were contingent on their attaining twenty-one.

PRACTICE—MORTGAGE—FORECLOSURE—REDEMPTION—SUBSEQUENT INCUMBRANCES.

Smithett v. *Hesketh*, 44 Chy.D., 161, was a foreclosure action in which the plaintiffs were first mortgagees; the second incumbrancer was an annuitant under a settlement; the plaintiffs were third mortgagees, and there were several subsequent mortgages. The plaintiff claimed that only one day should be given to all the subsequent incumbrancers to redeem his first mortgage, but North, J., gave the annuitant six months to redeem, and in case she did redeem gave the plaintiff, as third mortgager, three months to redeem subject to the annuity, and a third period of three months to the subsequent incumbrancers; but if the annuitant did not redeem, giving the subsequent incumbrancers a second period of only three months.

PRINCIPAL AND SURETY—CO-SURETIES—COUNTER SECURITY GIVEN BY PRINCIPAL DEBTOR TO ONE CO-SURETY—RIGHT OF SURETIES TO PARTICIPATE IN SECURITY GIVEN TO CO-SURETY.

Berridge v. *Berridge*, 44 Chy.D., 168, is an important decision on the law of principal and surety, and is a development of the doctrine established by *Steel* v. *Dixon*, 17 Chy.D., 825, in which it was decided that a surety is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives by virtue of any security he may hold. The necessary effect of this rule is, as is shown by this case, that where there are several sureties, and one of them obtains from the principal debtor a security for his liability, this security virtually enures for the benefit of his co-sureties for the full amount of their liability; because as often as the surety who holds the security recovers any payment which he has made on account of the principal debt, he is bound to share the sums so received with his co-sureties in case of their liability; and as he has the right to resort to his security for indemnity against the amount so paid his co-sureties, the security is virtually a security for the whole debt, and not merely for the share of the surety to whom it is given.

ARBITRATION—AGREEMENT TO REFER MATTERS IN DISPUTE—STAYING ACTION BY PARTY TO AGREEMENT—QUESTION OF LAW—C.L.P. ACT, 1854, S. 11—(R.S.O., C. 53, S. 16).

In re Carlisle, Clegg v. *Clegg*, 44 Chy.D., 200, an application was made to North, J., to stay the action under the C.L.P. Act, 1854, s. 11 (R.S.O., c. 53, s.

16), on the ground that the parties had agreed to refer the matter in dispute to arbitration; but it appearing on the application that a question of law, arising on the construction of a deed, was involved, the Court ordered the motion to stand over until after the delivery of the defence in order that an application might then be made to the Court to determine any question of law raised by the pleadings before referring, if necessary, to an arbitrator to dispose of any matter of account.

STATUTE OF FRAUDS—TWO INDEPENDENT DOCUMENTS—PAROL EVIDENCE TO CONNECT—SPECIFIC PERFORMANCE.

In *Oliver* v. *Hunting*, 44 Chy.D., 205, the defendant agreed to sell to the plaintiff a freehold estate for £2,375, and signed a memorandum which contained all essential terms of the contract, except that it omitted to refer to the property agreed to be sold. Two days afterwards the plaintiff sent the defendant a cheque for £375 as a deposit, and in part payment of the £2,375, and the defendant replied by letter, "I beg to acknowledge receipt of cheque, value £375, on account of the purchase money for the Fletton Manor House Estate." The defendant having subsequently refused to carry out the contract the present action was brought for specific performance, and the question was whether the receipt for £375 could be connected by parol with the contract so as to supply the defect in it as to the property to which it was intended to relate, and Kekewich, J., held that it could.

INFANT—MARRIAGE SETTLEMENT.

Duncan v. *Dixon*, 44 Chy.D., 211, the only remaining case in the Chancery Division, is a decision of Kekewich, J., as to the effect of a marriage settlement made by an infant, in which he arrived at the conclusion that the settlement was not void *ab initio*, but voidable only, which accords with the decision of our own Court as to the effect of an infant's deed; see *Foley* v. *Canada Permanent L. and S. Co.*, 4 Ont., 38.

RIGHTS OF RIPARIAN OWNER—NAVIGABLE RIVER.

Most of the cases in the Appeal reports are appeals from Scotch Courts, which it is not necessary to refer to here. In *Booth* v. *Ratte*, 15 App. Cas., 188, the Judicial Committee affirm the decision of the Court of Appeal of Ontario (14 Ont. App., 419), which affirmed the previous decision of the Chancery Divisional Court (11 Ont., 491), holding that a riparian proprietor, on a navigable river, has a right to moor to his bank a floating wharf and boat-house, so as the same shall not be an obstruction to navigation, and is entitled to maintain an action for damages caused thereto by any unauthorized interference with the flow and purity of the stream. In this case the injury was occasion by the defendants casting saw-dust into the river.

PRACTICE—VERDICT OF JURY—MOTION TO SET ASIDE VERDICT.

In *Phillips* v. *Martin*, 25 App. Cas., 193, the Judicial Committee adopted the rule laid down by the House of Lords in *Metropolitan Railway Co.* v. *Wright*,

11 App. Cas., 152, that a verdict of a jury ought not to be disturbed as against evidence, or the weight of evidence, unless it is one which a jury, viewing the whole of the evidence reasonably, could not properly find.

TORRENS TITLE—ABSENCE OF CAVEAT—POWER OF COMMISSIONER TO REFUSE REGISTRATION—(R.S.O., c. 116, ss. 10, 76-78.

Manning v. *The Commissioners of Title*, 15 App. Cas., 192, is a case which may be referred to as illustrating the practice under the Ont. Land Titles Act (R.S.O., c. 116). The case is an appeal from Western Australia, in which the Judicial Committee, affirming the Colonial Court, decide that according to the proper construction of the Land Transfer Act, 1874, of that Colony, sections 19 and 21, the Commissioners of Titles, who answer to our Master of Titles, is not bound to register a title merely by reason of the issue of the prescribed notices and the non-filing of a caveat, but that such notices may lead to the production of evidence, and the Commissioners have a discretion in consequence thereof, or of a reconsideration of the application, to refuse to register, subject to the opinion of the Supreme Court. We may, however, remark that under the Ontario Act and Rules the power of the Master of Titles to refer a matter for the decision of the Court appears to be restricted to cases where there is a contest, or where he is requested to do so by some person interested in the title. See R.S.O., c. 116, ss. 10, 76-78, Rules 15, 60. It is by no means clear that he has jurisdiction to do so for his own satisfaction.

Correspondence.

REPORT OF MACMILLAN v. *GRAND TRUNK RAILWAY.*

Editor of THE CANADA LAW JOURNAL:

SIR,—The letter which appears in the July number of THE CANADA LAW JOURNAL, signed by Mr. C. H. Masters, Assistant Reporter S.C.C., takes me to task for msirepresenting the facts of the above case and the result of the judgments, in an article published in the June number of the *Canadian Law Times*. Mr. Masters identifies me as being "evidently the plaintiff's solicitor," and makes use of this argument as a weapon for a personal attack.

I am not aware of any impropriety in a lawyer criticising a judgment or the official report of a case which has been finally decided, merely because he was one of the solicitors engaged in it.

I do not intend at present to gratify the Assistant Reporter by stating whether his guess is correct or not, but as he seems to imagine that solicitors are under some indefinite obligation to never comment on their clients' cases, I would direct his attention to a recent case in the Supreme Court, in which Mr. Justice Strong, having referred to a letter written by you, Mr. Editor, while acting as solicitor in a proceeding then pending, says: "I at present fail to see that it exceeded the bounds of that fair criticism upon the public administration of justice, which every one is entitled to write and publish"; and in which Mr.

Justice Gwynne said: "A judgment of a Court of Justice is open to fair comment and criticism which may call in question its soundness in point of law, even though it be still open to revision upon appeal." (*In re Henry O'Brien*, 16 S.C.R., pp. 213 and 225).

My object in writing and publishing the article in question was intended as a humble contribution to "that fair criticism upon the public administration of justice which," Mr. Justice Strong says, "every one is entitled to write and publish."

I have too high a regard for the Bench, and too many respected friends upon it throughout the Dominion, to knowingly publish an unfair criticism upon their conduct. I need scarcely add that any misrepresentation of facts in such an article would weaken, if not utterly destroy, the author's intended effect.

This being my position, I am not concerned to explain, at any great length, the opening clause of my article, which Mr. Masters stigmatizes as "misleading as well as grammatically absurd." He at least has caught its meaning fairly well.

I was firing at two very different objects, which happened to be in a line, and apparently I pulled both triggers simultaneously. But I hit the Assistant Reporter. Now, while he is flapping the water so vigorously, I may safely reload, and after pursuing the more important object of my enquiry a little further, I shall return to him. The more important object is, of course, the case in question, and the points of law decided or discussed in it.

The opinion of any Supreme Court Judge is entitled to great respect, even though it be a mere dictum, and so I think it may be useful to briefly comment on the views taken by some of their Lordships in this case.

The Chief Justice, it will be remembered, based his judgment upon a release alleged to have been given by the plaintiff to the C. P. R. It was not pleaded, and although the defendants' solicitor knew all about it weeks before the trial, no application to set it up was made, nor evidence given of it.

A very similar question arose in *Edevain* v. *Cohen*, 41 Chy.D., 563, where an effort was made to set up a judgment against some joint tort feasors. North, J., refused to allow the amendment, and his decision was affirmed by the Court of Appeal (43 Chy.D., 187).

In giving the judgment of the Court, Cotton, L.J., said:—"It has been contended that a former judgment obtained in another action by these plaintiffs against other tort feasors engaged in this transaction was a bar to this action, and that the appellant was entitled to raise that point without any amendment of the pleading. . . . The contention of the appellant, however, is that he is only raising a point of law, not an issue of fact. But that is not so; the amendment would raise facts to enable a point of law to be relied upon, and those facts ought, according to the rule, to have been pleaded by the present appellant in answer to this action. Then it is said that the appellant ought to have liberty to amend his pleadings. An application to that effect was made to Mr. Justice North, and the learned judge, after he had heard all the evidence, refused leave to amend. That was done by him in the exercise of his discretion, and that fact alone, to my mind, is a strong reason to induce us now to refuse leave to amend.

Another strong reason is this—I do not think that this amendment is necessary to bring out the real question between the parties. I think this amendment is proposed merely to enable the appellant to avail himself of what I may call a technical rule of law, supported by the cases which have been referred to, and not in order to determine the real issue which ought to be determined in this action. Further, this objection was not taken and insisted upon at once by Cohen, the present appellant, in the Court below; it was first mentioned, and the objection was first taken by counsel, who then appeared for another defendant, and it was only raised and insisted on on behalf of Cohen after substantially all the evidence had been taken, and he had taken his chance of the evidence turning out in his favour."

In *Edevain* v. *Cohen*, as it appears, evidence was given and an application to amend was made at the trial, whereas in MacMillan's case no evidence of the release was given, nor was any application to amend made at the trial.

It is almost impossible to believe that Chief Justice Ritchie, deciding as he did, was not under the impression that the release in question was pleaded, and that evidence of it had been adduced at the trial.

The respondent in the present case appears in his factum to have relied upon the case of *Morton* v. *G. T. R.*, which is reported along with *Vogel* v. *G. T. R.*, in 10 A.R., 162, and 11 S.C.R., 612. In Morton's case, the contract, just as in the present case, was to carry from a point in Ontario to a point in Manitoba. The goods were damaged in Ontario by the negligence of the defendants or their servants, and it was held that, under the Railway Act, the defendants could not avail themselves of any conditions.

The only difference between that case and MacMillan's was, that in the latter the goods appeared to have been damaged in Manitoba.

It is to be regretted that Mr. Justice Strong, in his judgment, disposed of this point without discussing the case of *Dickson* v. *G. N. R.*, 56 L.J., Q.B., III, upon which the respondent appears to have based one of his strongest arguments, and in which, as in MacMillan's, the loss occurred on the line of another Railway Company.

Another argument put forward by the respondent was, that the defence was bad at common law.

The case usually cited on behalf of carriers within Ontario as justifying conditions exempting them from liability for their own negligence is *Hamilton* v. *G.T.R.*, 23, U.C., Q.B., 600.

In that case, as appears by the report, *but not by the head note*, the defendants' charges were not prepaid, whereas in MacMillan's case the charges were prepaid.

The respondents' factum argues this point at considerable length, making extracts from many English, Canadian, and American decisions, and points to the conclusion that *Hamilton* v. *G. T. R.* was itself wrongly decided, and at all events that it is not decisive of MacMillan's case on this point.

Mr. Justice Strong passes over what appears to be a point deserving attention, with the remark, "There was no statutory or other legal impediment to a

contract by them limiting their liability either as carriers or otherwise in respect to the goods to be carried after they had left that company's own line."

The question of *res judicata* arising out of the demurrer was not, as I stated in my article, properly before the Supreme Court at all, but as Mr, Justice Strong has given us his opinion upon it, and it is rather a nice point, I quote the following extract from a case decided in the Court of Appeal in England, not referred to by his Lordship:

"No authority has been cited which shews that a man is obliged to go on repeating an objection once clearly and distinctly taken. I am of opinion, therefore, if the case depended upon this point, that it is not now too late to repeat the objection which was taken in the Court below upon demurrer, or too late to give leave to appeal from the demurrer so as to take it again, because I cannot conceive that it would be right to allow a man who has taken an objection to lose it because he has not gone on verbosely to repeat it a second time on a subsequent occasion." (James, L.J., in *Johnasson* v. *Bonhote*, 2 Chy.D., 301).

But to return to the Assistant Reporter.¶ The first portion of my article which he deals with is the following: "The judgment of the Privy Council refusing leave to appeal was delivered more than a year ago, and must have been in the hands of the Supreme Court Reporter before the publication of the report in question. Why was it not alluded to?"

Now, I was in a position to put this matter in a much stronger light, for I happened to know that not merely the judgment of the Privy Council, but the petition upon which it was based were furnished by the much abused plaintiff's solicitor to the officials of the Supreme Court at Ottawa several months before the report in question appeared, for the express purpose of framing a proper report.

The Assistant Reporter takes some pains to shew that the writer was not justified in assuming that the judgment (of the Privy Council) must have been in the hands of the Reporter, but in so doing he stumbles into the distinct admission that it was in his hands. Here are his words:

"But had such a note appeared at the end of the case of the *Grand Trunk Railway Co.* v. *MacMillan*, it would have been misleading, inasmuch as it would have been open to the inference that the judgments of the Supreme Court were approved by the Privy Council, *and so it was omitted.*"

That is to say, the Reporter of this case, with the judgment of the Privy Council before him, studiously concealed from the profession the very thing which they were most interested in learning.

The second point discussed by Mr. Masters relates to the legal results of the judgments of the Court of Appeal. The conclusion I arrived at in my article was based upon a very simple application of the Rule of Three.

The defendants required the favourable opinion of three judges in the Court of Appeal, in order to reverse the Divisional Court. They only obtained two.

The same thing occurred in the Supreme Court. The Assistant Reporter gives us his reasons for framing the head note on this point as he did, but they are not satisfactory.

The opinion of Mr. Justice Strong was, of course, entitled to great weight, but why the Reporter should depend for his facts or law upon the factum of one of the parties to a cause is not so clear.

Whatever view may be taken of the legal result of the point in question, Mr. Masters was not in any way taken off his guard, for I have good reason to believe that his attention was directed to this very point several months before his report was published.

The next point dealt with by Mr. Masters, and the only one in which he attempts to verify his charge against me of misrepresenting the facts of the case, relates to the demurrer. In my article, after quoting the condition mentioned in the head note, and the opinion of Strong and Taschereau, JJ., thereon, I had stated that the plea in question *was never demurred to at all.*

Mr. Masters' comment upon this is as follows:

"We will first deal with the question of fact contained in the last sentence. The holding is given in almost the exact words used by Mr. Justice Strong in his judgment; so, if the writer is correct, his Lordship has founded that holding upon a state of facts which did not exist. If such were the case, the reporter would be perfectly justified in framing his head note upon the judgment as it stood, but the fact is that this is one of the instances of the writer's ignorance of his own case, for there can be no doubt that the plea in question was demurred to. The demurrer was to paragraphs four and eight; among others, of the statement of defence; and both these paragraphs set up a breach of this condition. Mr. Justice Strong is perfectly right as to the facts, and they are presented in the same way in the appellants' factum."

Mr. Masters commenced his letter by referring to me as "evidently the plaintiff's solicitor." The only evidence of this identity in my article now comes to light, namely, ignorance of the case in question.

The Assistant Reporter has discovered and propounded a somewhat novel principle, which may be termed Selection by Inverse Ratios, according to which professional men are found to act in inverse ratio to their duty and means of knowledge. Whatever objections might be raised to this principle, it must be conceded that the Assistant Reporter is at least consistent in following it scrupulously himself.

The materials which he had at hand, in framing his report and writing his letter, certainly included the appeal book, the factums of both parties, the petition for leave to appeal to the Privy Council, and the judgment thereon. He is quite correct in stating that the demurrer was to paragraphs four and eight; among others, of the statement of defence; but he is quite wrong in stating that both these paragraphs set up a breach of the condition in question. Neither of them did so. Paragraph four of the defence sets up the condition of non-liability beyond the defendants' line, and paragraph eight alleges that the loss occurred beyond the limits of the defendants' line.

The demurrer was to the original statement of defence, as is clearly shown in the appeal book. After the C. P. R. were added the G. T. R. filed an amended statement of defence, omitting what had been paragraph No. 3.

In the appeal book the original defence was printed (including the defence in its amended form) and all the paragraphs after No. 3 were double numbered, with the following explanatory note at the end:

"NOTE.—The paragraph in italics was in the original, but not in the amended statement of defence, and the various paragraphs of the original statement of defence were numbered as is shown by the numbers in italics."

The numbers printed opposite to the paragraph setting up the condition in question were "*5*, 4." The condition in question was set up in the fifth paragraph, and, as I said, was never demurred to at all.

I leave the reader to judge whether Mr. Masters has made out his charge of misrepresentation, and whether he has not, with all the proper material before him, been guilty of both *suggestio falsi* and *suppressio veri*.

The next point which the Assistant Reporter deals with scarcely justifies further remark, were it not for the extraordinary views apparently held by the S. C. Reporters upon the subject.

In attempting to justify his head note, the Assistant Reporter proceeds:—

"Mr. Justice Taschereau simply says: 'I think the appeal should be allowed for the reasons stated in the judgment of Mr. Justice Strong.' Is the reporter to assume that Taschereau, J., agrees with everything contained in Judge Strong's judgment? I think the most that can be said is that he concurs in the grounds upon which Judge Strong disposes of the case, and not in any dicta holdings which are not necessary for such disposition. At all events it is a vexed question, and one which, I have no doubt, is troublesome to all reporters, how far the concurrence extends in such cases; and the Supreme Court Reporters have always endeavored in such cases to avoid the risk of making a judge appear to decide what he may have had no intention of holding. Moreover, why should the writer complain that a holding which he considers wrong and founded on a misapprehension of facts is restricted to a single judge? He surely would not wish to multiply error."

I doubt if their Lordships at Ottawa will feel grateful to the Assistant Reporter for thus interpreting their meaning.

A judge of the Supreme Court, in giving judgment, says that an appeal should be allowed for the reasons stated in the written judgment of another judge.

The Assistant Reporter innocently enquires whether he is to assume that the first learned judge means what he has said!

The want of unanimity among the members of the Supreme Court is notorious, but it is rather broad humor for one of their own reporters to tell us that when one of their Lordships says he agrees with another the reporters cannot believe their ears.

Mr. Masters' view is that the concurring judge only agrees with the grounds upon which the other judge disposes of the case, and not in any dicta holdings which are not necessary for such disposition. What is the meaning of this? Mr. Justice Strong "disposed of the case" as much on the ground in question as upon any other ground. But supposing all the grounds relied upon by

Mr. Justice Strong turned out to be "dicta holdings," as I have endeavored to show they were, what is the result? Why, according to Mr. Masters, Taschereau, J., agrees with no part of the judgment of Strong, J., at all.

This delicacy of dealing with the views of the learned judges ill accords with a previous portion of Mr. Masters' letter, where in treating of the decision of the Court of Appeal the Assistant Reporter does not hesitate to impute to Chief Justice Ritchie, amongst the other members of the Supreme Court, an opinion which he certainly does not express.

The last point taken up by Mr. Masters is my comment upon the flagrantly erroneous statement of facts which he inserted in his report.

No one would dispute that "the statement of facts is only supposed to contain what is necessary for a proper understanding of what is decided by the judgments."

I will not repeat what appeared in my article upon this point, except to say that Mr. Masters fails to point out a single error in my statement.

It is really a difficult matter to comment with patience upon a reporter who, having an important judgment in his hands, bearing upon the case he is reporting, reasons with himself that it must not be *assumed* to be before him; who omits all reference to the said judgment lest it should throw light on the case in hand; who being placed upon his guard as to a rather nice point of law, takes the judgment of only some of the judges and the factum of only one of the parties in order to solve it; who, with the appeal book before him, deliberately mis-reads it, relying once more upon the judgment of two judges and the factum of one of the parties; and who, when a judge says that he agrees with the reasons given by another judge, declines to believe it, and with a laudable wish not to multiply error, frames his head note accordingly.

The light which Mr. Masters sheds upon Supreme Court reporting can scarcely fail to interest the profession, and in conclusion I would suggest, as the most fitting tribute to his effort, that, for the future guidance of the staff at Ottawa, the Assistant Reporter should be himself reported.

AMICUS CURIÆ.

Notes on Exchanges and Legal Scrap Book.

RULES OF THE ROAD.—In the case about the Rule of the Road (ante p. 305) we stated the remarkable difference in that same Rule in England and America. In England the old rhyme states the fact very compactly and prettily:

"The Rule of the Road is a paradox quite,
As I think I can prove in my song;
If you go to the left, you will always go right,
But if you go right, you go wrong."

Now, what is the reason of this difference? An occasional correspondent writes us as follows, giving a suggestion: "In the crowded streets of London it

would, at most, be impossible to drive to the right; the driver sitting on the right side of the carriage, the two drivers going to the left, will be able to see exactly how nearly their wheels will come together, and so to pass safely, if there is just room for them to go clear; and the two drivers can speak if necessary, which would not be the case if they each drove to the right side of the carriage, which makes the observance of the English rule more necessary. Our American rule would seem to have arisen from the fact that in new countries driving was for some time done chiefly by drivers walking by the side of the horses or cattle they were driving, in which case the American rule would undoubtedly be the most convenient and best. I have heard it said that the American driver often sits on the left side of his carriage, and this would certainly be the best, if the American rule of driving to the right is to be followed when the driver sits in the carriage. There is an origin for every popular rule or custom."

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

EASTER TERM, 1890.

(Continued from page 369).

The report of the Finance Committee was ordered for immediate consideration by paragraphs, and adopted.

Ordered, that two copies of the amended library catalogue of books, and lists of subsequent acquisitions of books, and two copies of an inventory of pictures and furniture be prepared, and that one copy be placed in the safe of the Society, and the other in the custody of the Treasurer for safe keeping, and that the further lists and inventories be from time to time added to these copies.

Ordered, that it be referred to the Finance Committee to enquire and report on a plan for systematizing the use and increasing the amount of the wardrobe accommodation, and making a charge therefor.

The list of solicitors in default was referred to the Committee, with instructions to cause the necessary enquiries to be made as to the names on the list, and to devise a system of checking from time to time the names of apparent defaulters in the future, and report to Convocation.

Ordered, that Mr. Osler's notice for this day stand till next meeting of Convocation.

Ordered, that the old lunch room be allowed to be used as a lunch room during the recess of the Law School.

Saturday, June 7th.

Convocation met.

Present—The Treasurer, and Messrs. Moss, Murray, Irving, Bruce, Foy, Shepley, Kingsmill, Martin, Robinson, Cameron, McCarthy, McMichael.

Mr. Moss, from Legal Education Committee, reported as follows:

1. In the case of Dugald Campbell, recommending that the filing of the articles be allowed.

2. In the case of G. A. T. Wright, recommending that his attendance at the Law School having been allowed as sufficient, he be allowed to present himself for call in Trinity Term next.

3. In the case of A. C. M. B. Jones, recommending that the prayer of the petition be not granted.

The report was received, adopted, and ordered accordingly.

Mr. Irving, from the Select Committee appointed on the question of electric lighting, reported as follows:

REPORT OF THE ELECTRIC LIGHT COMMITTEE.

On the 14th February last, Convocation ordered that the several letters of Messrs. Thornberry & Co. (27th Jan., 1890); of F. A. Barr, manager of the Edison Electric Light System (17th Dec., 1889); F. Nicholls, manager of the Toronto Incandescent Electric Light Co. (19th Dec., 1889); which had been laid before them on the subject of introducing electric light into the library, be referred to a Committee of Benchers, consisting of the Library Committee together with Messrs. Osler, Mackelcan, Murray, and Lash, for report.

The Committee consulted Mr. Storm on the subject, and obtained a report from him (7th April, 1890), and, after consideration, beg leave to submit to Convocation the following:

1. The power of light emitted by the four Lingren gas lamps now suspended from the centre of the library, is equal to 800 candles.

2. The Edison Electric Light System Company, of which Mr. F. A. Barr is manager, propose to put in the library fixtures for lights equal to 768 candles, believed to be sufficient for all library purposes, at a cost of $521.

3. The Toronto Incandescent Electric Light Company, of which Frederic Nicholls is manager, are prepared to supply the light which may be used at the rate of one cent per hour for a 16 candle power lamp, and in order to connect the library with the Light Company's underground main, 200 feet of underground main will have to be laid.

4. The cost of material and labour for this connection, the Light Company allege, would be not less than $400, and as the income they would derive from the light to be furnished will, they consider, be comparatively small, they do not feel justified in bearing the whole cost, but will assume half if the Law Society will assume the other half.

5. Since the offer to put up the fixtures for lights by the company represented by Mr. Barr has been made, the Toronto Incandescent Electric Light Company have made arrangements for doing the same kind of work, and if they will undertake the introduction of their lights on equally advantageous terms, it may be desirable that the whole work should be placed in the hands of the Toronto Incandescent Electric Light Company.

6. The 768 candle power which it is proposed to introduce is to be distributed over the library as follows:

Twenty-one lamps on brackets fixed to the top of each alternate book-case, on the end facing the centre of the room.

Three lamps of thirty-two candle power each at the secretary and assistant secretary's desk.

One sixteen candle power lamp in every passage between book-shelves.

7. Details of the character of the bracket for the lights, and the finish and system of buttons to turn on the lights, can be learnt from Mr. Storm's report, together with the proposals contained in the letters referred to the Committee, which are enclosed herewith.

8. The proposals do not include lighting the two library annexes.

9. As the quantity of electric light required will be paid for according to meter, and the gas lighting system will remain untouched, whereby the library will continue to be generally lighted, the Committee believe that the introduction of the electric light as an auxiliary may be thus secured on moderate terms.

The Committee recommend that Mr. Storm be directed to make the necessary arrangements for the introduction of electric light to the library in the terms within mentioned, with power to let the whole work to the Toronto Incandescent Electric Light Company, if their terms are not in excess of the offer made by Mr. Barr on behalf of his company.

(Signed) ÆMILIUS IRVING,
Chairman.

Ordered for immediate consideration and adopted.

Ordered, that Mr. Storm have power to arrange for the extension of the electric light system to the annexes to the library, in co-operation with the chairman of the Committee.

Ordered further, that it be stipulated that the property in connection with the main belong to the Society.

Mr. Murray, from the Finance Committee, reported that the Committee had met and made some progress with reference as to the defaulting solicitors, and expected to report fully at the next meeting of Convocation.

Mr. Moss, from the Legal Education Committee, presented a report on the subject of the attendance at the Law School by various students who have petitioned for allowance of attendance.

The Committee further reported as to those students who had failed in certain subjects at the May examinations, and as to September examinations that they had made an order as follows: That students whose attendance at lectures has been allowed as sufficient, and who wrote at the May examinations and failed to pass, are to be at liberty to present themselves for examination in September next, and be examined on those subjects in which they failed to obtain 55 per cent. of the marks obtainable on such subjects, and that the marks obtained by them in such examination shall be substituted for the marks obtained by them on such subjects in the May examinations, and the result is to be reported by the examiners.

But any student to whom the foregoing regulation applies may, at his option, take the September examination in all the subjects, and in such case no regard shall be had to the marks obtained in the May examination.

The September Law School Examinations to be held on the following days, viz.:

First Year—Written Monday Sept. 1st.

Second Year—Written Friday, Sept. 5th.

The report was considered and adopted.

The Report of the Examiners on the Law School Examinations was received and read, as follows:

(1) The Report on the Pass Examinations for the First Year reporting that the following gentlemen had passed, viz.: Messrs. L. P. Duff, J. S. Johnston, W. Cross, C. H. Barker, J. H. Moss, F. C. Snider, R. M. Lett, B. M. Aikins, J. D. Spence, A. Y. Blain, C. H. Glassford, G. A. Kingston, R. L. Johnston, D. R. Tate, H. J. Martin, W. Douglas, and G. S. Morgan, with honors; S. V. Blake, G. C. Biggar, F. W. McConnell, R. J. Gibson, C. R. Hamilton, W. J. Boland, W. W. B. McInnes, and J. E. O'Connor, equal; T. B. Martin, J. G. Smith, W. T. J.

Lee, A. E. Scanlan, W. J. McDonald, S. F. Houston, D. Martin, C. S. Coatsworth, W. M. Allen, J. R. Blake, F. M. Canniff, and J. E. Powell, equal; S. Griffin, M. P. Vandervoort, T. C. Gordon, H. McConaghy, A. Bain, W. G. Bee, and T. R. E. McInnes, equal; H. W. C. Shore, W. I. Dick, J. W. Henderson.

Ordered for immediate consideration.

The Secretary reported that all those who had passed had been allowed their attendance at lectures.

Ordered, that the above named gentlemen be allowed the above examination.

(2) The Examiners' Report on the Pass Examination for the Second Year was received and read, reporting that the following gentlemen had passed, viz.: Messrs. J. S. Denison, B. S. Lefroy, N. Simpson, W. Stewart, J. J. Warren, T. M. Higgins, G. D. Minty, N. B. Gash, A. F. Hunter, J. E. Jones, W. Johnston, H. D. Leask, Z. Gallagher, T. C. Thomson, H. Langford, J. Hales, and J. McBride, equal, with honors; and P. E. Ritchie, E. G. Fitzgerald, A. B. Armstrong, J. A. Taylor, W. A. Leys, F. C. Hough, W. A. Lamport, G. S. Macdonald, F. C. Jones, E. F. Blake, and F. R. Blewett, equal; G. Wilkie, A. W. Ballantyne, H. Jamieson, and J. B. McLeod, equal; J. F. Tannahill, T. H. Lloyd, J. E. Cooke, and R. Parker, equal; S. King, W. E. Burritt, T. B. P. Stewart, G. P. Deacon, J. A. McMullin, E. Mortimer, N. Kent, R. B. Henderson, R. N. Noble, W. H. Cawthra, W. F. Hull, W. H. Hodges, W. A. Baird, F. G. Evans.

Ordered for immediate consideration.

The Secretary reported that all those who had passed had been allowed their attendance at the lectures.

Ordered, that the above named gentlemen be allowed the above examination.

(4) The Report on Honors and Scholarships for the First and Second Year Examinations was received and referred to a Select Committee, composed of Messrs. Moss, Kingsmill and Foy, for enquiry and report.

The petition of R. V. Riddell and E. Hunter was read and received.

Ordered, that the petition and papers be referred to the Discipline Committee to enquire and report whether a *prima facie* case has been shewn for investigation.

Ordered that Mr. Osler's notices stand till next meeting of Convocation.

The letter of 7th June, from the editor on the subject of the reports, was read.

Ordered, that the Reporting Committee be discharged from action on the order made at last meeting on the subject of the reports.

The Select Committee, to whom was referred the Report of the Examiners for Honors and Scholarships in the Law School Examinations, reported as follows:

They find that the following candidates, namely, Messrs. L. P. Duff, J. S. Johnston, W. Cross, C. H. Barker, J. H. Moss, F. C. Snider, R. M. Lett, B. M. Aikins, J. D. Spence, A. Y. Blain, C. H. Glassford, G. A. Kingston, R. L. Johnston, D. R. Tate, H. J. Martin, W. Douglas, and G. S. Morgan, passed the First Year Examination with honors; and that Mr. Duff is entitled to a scholarship of $100, Mr. J. S. Johnston to $60, and Messrs Cross, Barker, Moss, Snider, and Lett, to a scholarship of $40 each.

The Committee further find that Messrs. J. S. Denison, B. S. Lefroy, N. Simpson, W. Stewart,

J. J. Warren, T. M. Higgins, G. D. Minty, N. B. Gash, A. T. Hunter, J. E. Jones, W. Johnston, H. D. Leask, Z. Gallagher, T. C. Thompson, H. Langford, J. Hale, and J. M. Bride, passed the Second Year Examination, with honors; and that Mr. Denison is entitled to a scholarship of $100, Mr. Lefroy to $60, and Messrs. Simpson, Stewart, Warren, Higgins, and Minty, to a scholarship of $40 each.

Ordered for immediate consideration.

Adopted, and ordered accordingly.

The Report of the Principal of the Law School to the Chairman of the Legal Education Committee ordered to be taken into consideration this day, was read.

Ordered that it is expedient to appoint two additional lecturers in the Law School, and that the Secretary be directed to insert the usual advertisement, calling for applications for three lectureships, and that a call of the Bench be made for Tuesday, the 24th inst, to make such appointments.

Ordered, that the question of house accommodation for the Law School be referred to a special committee composed of the members of the Legal Education Committee, and Messrs. Irving, Osler, Martin, McCarthy, and Foy, to report at the next meeting of Convocation.

Ordered, that Mr. Irving and Mr. Hoskin be authorized, on behalf of Convocation, to take steps to oppose any attempt to place a registry office on the grounds of Osgoode Hall.

The letter of Arthur Armstrong was read and ordered to stand till next meeting of Convocation.

Ordered that Mr. A. Dixon Patterson be commissioned to paint a copy of the portrait at Ottawa, of Sir William Campbell, late Chief Justice of Upper Canada, at the sum of $250.

CORRECTION.

In the *resume* of the proceedings of the Law Society in Hilary Term, 1890, the copy of the Rules amending the Rules relating to the Law School, printed on pages 234 and 235 of this volume, is inaccurate. Following are the correct Rules:

RULES TO AMEND THE RULES RELATING TO LAW SCHOOL.

164 (*g*). Students-at-Law and Articled Clerks who are exempt from attendance at the Law School, either in whole or in part, may elect to attend the Law School and pass the Examinations thereof in lieu of passing the Examinations under the existing Curriculum applicable to Students and Clerks, so exempt in whole or in part, as aforesaid; such election shall be made in writing signed by the Student or Clerk, addressed to the Principal of the Law School, and deposited with him when producing the Secretary's receipt for payment of the Law School fees for the first term to be attended, in conformity with such election, and after such election the Student or Clerk so electing shall be bound toattend the Law School and pass the Examination thereof in the same manner as if originally bound to attend the Law School and pass the Examinations thereof.

164 (*h*). Students-at-Law and Articled Clerks who shall elect to attend the Law School as provided in Rule 164 (*g*), and who would be entitled to present themselves for their First or Second Intermediate Examination, or for their Final Examination, as the case may be, in any term during any School year term, or before Michaelmas Term then next ensuing, shall, upon proof of such attendance, and of passing the Examinations prescribed for the First or Second Intermediate Examination or Final Examination (as the case may be), at the close of such School term, or at the Examinations thereof, commencing with the first Monday in September, be allowed such Examination in lieu of their First or Second Intermediate or Final Examination, as the case may be.

Provided, nevertheless, that no Student-at-Law or Articled Clerk shall be called to the Bar or admitted unless after the expiration of the period of service under articles or attendance in Chambers, as the case may be.

164 *(i)*. Rules 164 *(d)*, 164 *(e)*, 164 *(f)*, shall apply to rules 164 *(g)*, and 164 *(h)*.

164 *(j)*. All Students-at-Law and Articled Clerks admitted upon the books of the Law Society in Michaelmas Term, 1889, and who by virtue of any previous rule may be required to attend the School during the term of 1889-90, shall be deemed to have duly attended during said term, if they shall have attended not less than five-sixths of the aggregate number of Lectures, and four-fifths of the number of Lectures of each series pertaining to the first year of the School course which shall have been delivered subsequent to the date of their said admission.

[4th February, 1890.]

STATEMENT OF REVENUE AND EXPENDITURE OF THE LAW SOCIETY

FOR YEAR ENDING 31ST DECEMBER, 1889.

REVENUE.

Certificate and Term Fees	$23,071 50	
Less Fees returned	388 00	
		$22,683 50
Notice Fees		744 00
Attorneys' Examination Fees	$6,237 00	
Less Fees returned	110 00	
		6,127 00
Students' Admission Fees	$9,469 00	
Less Fees returned	740 00	
		8,729 00
Call Fees	$11,002 00	
Less Fees returned	865 00	
		10,137 00
Interest and Dividends		3,995 65
LAW SCHOOL :—		
Students' Fees	$1,320 00	
Less Fees returned	20 00	
		1,300 00
REPORTING :—		
Rowsell & Hutchison, for Reports sold		1,135 21
SUNDRIES :—		
Fees on Petitions, Diplomas, etc.		133 87
Fines, Lending Library account		10 20
Fees, Telephone Office		148 68
		$55,144 11
Total amount of Expenditure as per following pages		$48,646 27
Balance		6,497 84
		$55,144 11

N.B.—This Expenditure does not include an amount since paid to the Ontario Government for heating the Law Society Building for the winter of 1888-89—$850.

EXPENDITURE.

REPORTING :—		
Salaries	$9,697 85	
Printing Reports by Contract	5,596 56	
Notes for LAW JOURNAL and *Law Times*	244 49	
Insurance on Reports at Rowsell & Hutchison's	90 00	
		$15,628 90
LAW SCHOOL :—		
Salaries	$2,766 65	
Printing and Stationery	60 40	
Travelling Expenses of Principal and others to U. S. Law Schools	302 89	
		3,129 94
EXAMINATIONS :—		
Salaries	$2,483 32	
Scholarships	1,200 00	
Medals	121 65	
Printing and Stationery	304 70	
Examiners for Matriculation	362 00	
		4,471 67
LIBRARY :—		
Books, Binding, and Repairs	5,488 75	
COUNTY LIBRARIES	2,348 20	
GENERAL EXPENSES :—		
Salaries—		
Secretary and Librarian	$2,000 00	
Assistants	1,683 33	
Auditor	100 00	
Housekeeper	525 00	
		4,308 33
Lighting, Heating, Water, and Insurance—		
Gas	$175 23	
Water	78 00	
Insurance (Carpenter's Risk)	10 00	
Fuel	202 25	
Repairs to Apparatus	55 35	
		520 83
Grounds—		
Gardener	$315 50	
Tools and Repairs	24 28	
Wire	2 15	
Tiles	8 73	
Earth and Loam	56 05	
Trees	25 75	
Flowers and Ornamental Plants	47 15	
Labour	388 30	
Snow Cleaning	63 23	
		931 14
ADDITIONS, ALTERATIONS, AND REPAIRS:		
Addition for Law School and Consultation Rooms	$700 00	
Library, new shelving, and removing galleries	$1,757 92	
Removing coal vaults, and repairing sewer and area at rear	842 02	
Architect's Fees	175 82	
Repairs	744 88	
	3,520 64	
Furniture	533 04	
New asphalt sidewalks	1,630 00	
		6,383 68

PRINTING, ADVERTISING, STATIONERY, ETC.:—			
Printing		$404 13	
Advertising		322 54	
Stationery		157 45	
Postages		78 35	
Telegrams		6 48	
Legal Charts, 1888 and 1889		200 00	
Resume		71 50	
			1,240 45
LAW COSTS:—			
Solicitor's Salary		$300 00	
Hands *v.* Law Society, deposit for security for appeal		400 00	
Hands *v.* Law Society, costs		807 49	
Macdonell *v.* Law Society, costs		116 62	
Law Society *v.* Carthew		40 21	
" *v.* Taylor		23 29	
" *v.* Macdougall		25 96	
" *v.* Gardner		34 64	
" *v.* Donovan		78 57	
" *v.* Scatcherd		3 69	
General Costs		12 29	
Fees paid Taxing Officer		9 00	
Counsel Fees, Lount, Q.C. (Macdonell *v.* Law Society)		80 00	
Counsel Fees, Reeve, Q.C. (Hands *v.* Law Society, and Macdonell *v.* Law Society)		80 00	
			2,011 76
TELEGRAPH AND TELEPHONE SERVICE:—			
Telephone Rent		$100 00	
Salary of Operator		494 75	
" Messenger		120 00	
			714 75
SUNDRIES:—			
Valuation of Furniture (Oliver, Coate & Co.)		$100 00	
Tinsmith		11 78	
			111 78
Moving and Dusting Books and Pictures	$55 33		
Attending Clocks	9 00		
Oiling Floor, etc	8 00		
Scrubbing	7 80		
Soap	43 57		
		$123 70	
Entertaining Governor-General, Term and Committee Luncheons		1,115 90	
Ice		37 50	
Locks and Keys		21 30	
Photographs of Hall		3 75	
Petty Charges		17 44	
Additional Attendance During Term		16 50	
Guarantee Co		20 00	
			1,356 09
Total Expenditure			$48,646 27

DIARY FOR AUGUST.

1. Fri....Slavery abolished in British Empire 1843.
3. Sun...*9th Sunday after Trinity.*
6. Wed..Thomas Scott, 4th C. J. of Q. B. 1860. Prince Alfred born.
9. Sat....Fort William Henry capitulated 1757.
10. Sun...*10th Sunday after Trinity.*
11. Mon...Last day for filing notices for Trinity Term. Battle of Lake Champlain 1814.
13. Wed..Sir Peregrin Maitland, Lieut.-Governor, 1818.
14. Thur.Battle of Fort Erie, 1814.
16. Sat....Battle of Detroit, 1812.
17. Sun...*11th Sunday after Trinity.*
23. Sat....Last day for filing papers and fees for final examinations.
24. Sun...*12th Sunday after Trinity.* St. Bartholomew.
30. Sat....Long vacation ends.
31. Sun....*13th Sunday after Trinity.*

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

COURT OF APPEAL.

From FALCONBRIDGE, J.] [June 26.

ERIE AND NIAGARA R. W. CO. v. ROUSSEAU.

Railways—Lands acquired for railways—Adverse possession—Statute of Limitations.

A title by adverse possession may be acquired, as against a railway company, to lands originally obtained by them for railway purposes.

Bobbett v. *South Eastern R. W. Co.*, 9 Q.B.D., 424, approved.

Judgment of FALCONBRIDGE, J., affirmed.

H. Symons for the appellants.

H. H. Collier for the respondents.

From C.P.D.] [June 28.

DOAN v. MICHIGAN CENTRAL R. W. CO.

Negligence—Contributory negligence--Railways—Pleading—"Not guilty."

This was an appeal by the defendants from the judgment of the Common Pleas Division, 18 O.R., 482, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 19th of May, 1890.

The Court held that evidence of contributory negligence would properly be admissible under a defence of "not guilty," without any special plea of contributory negligence; and that at any rate, in this case, even if, strictly speaking, the evidence were not admissible as the pleadings stood, still, the evidence having been given without objection, the plaintiff could not afterwards complain.

The Court also held that, upon the evidence, the finding of the jury as to contributory negligence was a proper one, and that the action therefore failed.

The Court allowed the appeal, with costs, and restored the judgment of STREET, J., at the trial.

H. Symons for the appellants.

G. T. Blackstock for the respondent.

From Co. Ct. Wentworth.] [June 28.

GOODMAN v. BOYES.

Statute of Limitations—Acknowledgment.

An acknowledgment of a debt, not being a debt by specialty, to be sufficient under the Statute of Limitations, must be made to the creditor, or to his agent. A general acknowledgment of liability, or an acknowledgment to a third person, will not be sufficient.

Judgment of the County Court of Wentworth affirmed.

Teetzel, Q.C., for the appellant.

W. Bell for the respondent.

From ROSE, J.] [June 28.

CAMERON v. CUSACK.

Fraudulent conveyance—Intent to defeat creditor.

A conveyance made by a debtor, in good faith of his ability to pay his existing debts, cannot be impeached by one who at the time has a right of action against him for a tort, and subsequently recovers judgment, even though the conveyance is made because of the threatened action.

Judgment of ROSE, J., 18 O.R., 520, reversed.

J. M. Glenn for the appellant.

J. S. Robertson for the respondent.

From Co. Ct. Hastings.] [June 28.

BONISTEEL v. SAYLOR.

Contract—Bills of exchange and promissory notes—Illegality—Public policy.

The plaintiff purchased from an alleged company 15 bushels of hull-less oats, paying there-

for $10 a bushel, and receiving the company's bond to sell for him 30 bushels of oats at the same price. The company found in the defendant a purchaser of 30 bushels of oats, and the plaintiff's oats were sold to him and his notes for $300 transferred to the plaintiff. This was but one of a very large number of similar transactions, and both the plaintiff and the defendant were aware of this. The oats were not worth more than ordinary oats, and the transactions were in fact speculative and fraudulent.

Held, (BURTON, J.A., dissenting) that the transaction could not be dealt with as an isolated one, but that the whole scheme must be looked at; that the tendency of that scheme was clearly contrary to the general well-being of the public, and therefore that the transaction in question, forming a part of that scheme, was against public policy and illegal.

Judgment of the County Court of Hastings affirmed on other ground.

Moss, Q.C., and *J. H. Simpson*, for the appellant.

Clute, Q.C., for the respondent.

From C.P.D.] [June 28

OWEN SOUND STEAMSHIP CO. *v.* CANADIAN PACIFIC R.W. CO. ET AL.

Railways—Joint traffic agreement—Ultra vires.

This was an appeal by the defendants and a cross appeal by the plaintiffs from the judgment of the Common Pleas Division, reported 17 O.R., 691, both of which came on to be heard before this Court (HAGARTY, C.J.O., BURTON OSLER, and MACLENNAN, JJ.A.), on the 19th and 20th of May, 1890.

The Court held, for substantially the same reasons as those given in the Court below, that the agreement between the plaintiffs and the Toronto Gray and Bruce Railway Company was a valid agreement, and they therefore did not discuss the question as to the validation of agreement by the subsequent legislation.

The Court agreed with the Court below upon the question of the termination of the agreement.

The appeal and cross appeal were dismissed with costs.

D. E. Thompson, Q.C., and *George Bell*, for the plaintiffs.

McCarthy, Q.C., and *G. T. Blackstock*, for the defendants.

Queen's Bench Division.

Div'l Ct.] [June 27.

HEPBURN *v.* TOWNSHIP OF OXFORD.

Ditches and Watercourses Act, 1883—Work not in accordance with award—Remedy—Costs.

Where an award has been made under the Ditches and Watercourses Act, 1883, the only remedy for the work not being completed in accordance with the award is the remedy provided by s. 13 of that Act. An action for damages was therefore dismissed.

Murray v. *Dawson*, 17 C.P., 588, followed; and *O'Byrne* v. *Campbell*, 15 O.R., 339, distinguished.

No other or greater costs were allowed to the defendants than if they had successfully demurred, instead of defending and going down to trial.

Aylesworth for the plaintiff.

W. R. Meredith, Q.C., *McKillop*, and *Chas. MacDonald*, for the defendants.

Div'l Ct.] [June 27.

GRAHAM *v.* MCKIMM.

Libel—Article referring to advertisement published contemporaneously—Fair criticism—Evidence—Plaintiff's case—Production of advertisement—New trial.

The plaintiffs brought a written advertisement to the defendant for the purpose of having it published in his newspaper, but the defendant refused to publish it; and the plaintiffs took it away, intimating that it would be immediately published in another newspaper. It was so published; and on the day of its publication, an article, written before its publication, appeared in the defendant's newspaper, referring to it as unfit for publication. The plaintiffs sued the defendant for libel. The trial Judge told the jury that if the article was nothing more than a fair criticism of the advertisement, it was not libellous. It was objected that the defendant was not entitled to criticize the advertisement because it had not been published before the article criticizing it.

Held, that this was not a valid objection. The trial Judge ruled that the plaintiffs were

bound to produce and put in, as part of their case, the written advertisement, referred to by the defendant in the article complained of; and the plaintiffs, though protesting, accepted the ruling, and put in the evidence.

Held, that the ruling was wrong; but that the plaintiffs were not entitled to a new trial, as the only wrong to the plaintiffs was to let the defendant's counsel have the last word with the jury.

The statement in Odgers, Bl. ed., s. 573, that "if the alleged libel refers to any other document, the defendant is also entitled to have the document read, as part of the plaintiff's case," is too broad.

Watson, Q.C., for the plaintiffs.

W. Read for the defendant.

Chancery Division.

ROBERTSON, J.] [May 14.

ELLIOTT *v* BUSSELL.

Husband and wife—Money paid by wife for use of husband—Corroborative evidence.

When in the administration proceedings of an estate of a deceased testator, it appeared that the plaintiff, his widow, had paid at the testator's request, out of her separate property, certain premiums payable by him on two Life Assurance policies on his own life, and the plaintiff swore that she was to be repaid the amounts so paid by her:

Held, that, on the plaintiff claiming these moneys in the administration proceedings, the onus was on the defendant, the executor, to shew that they were a gift from the plaintiff to the testator, and that it was not incumbent on the plaintiff to prove that the moneys were to be repaid to her before she could recover.

Laidlaw, Q.C., for the defendant.

Kilmer for the plaintiff.

ROBERTSON, J.] [May 22.

BRUYEA *v.* ROSE.

Action of trespass—Occupant of crown lands—Possession by tenant—Statute of Limitations.

The result of the cases appears to be that where a person is in possession with the assent of the Crown paying rent, as in *Harper* v. *Charlesworth*, 5 B. & C. 574, or where a person is a purchaser although the patent has not issued, such person can maintain trespass against a wrongdoer.

A tenant taking in land adjacent to his own by encroachment, must as between himself and the landlord be deemed *prima facie* to take it as part of the demised land, but that presumption will not prevail for the landlord's benefit against third persons.

Dickson, Q.C., for the plaintiffs.

Clute and Burdette for the defendants.

BOYD, C.] [June 4.

BANK OF COMMERCE *v.* MARKS.

Partnership—Debts of old firm—Privity.

G. M. & J. B. D., trading under the firm name of M. D. & Co., became indebted on certain promissory notes to the plaintiffs. G. M. left the firm, and S. M. formed a partnership with J. B. D., and continued the business under the same firm name, and this new firm agreed to assume the liabilities of the old firm.

Held, that the plaintiffs had no right of action against the new firm, merely because the latter had, pursuant to their agreement with old firm, made certain payments on account of the notes to the plaintiffs; nor because, apparently, under a mistake of law, the new firm had asked for an extension of time from the plaintiffs.

W. Cassels, Q.C., for the plaintiffs.

Laidlaw, Q.C., for the defendant Playfair.

Scott for the defendant Balfour.

Div'l Ct.] [June 9.

CITY OF KINGSTON *v.* CANADA LIFE ASS. CO.

Assessment and taxes—Insurance Company—Head office and branch office—Assessment of income at branch office—R.S.O. 1887, c. 193.

Held, reversing the decision of FERGUSON, J., reported 18 O. R. 18, that the amount of premiums, received year by year by the defendants at Kingston, were not assessable there.

"Income," as commercially used, means the balance of gain over loss in the fiscal year or other period of computation, and this is the meaning of the word in the Assessment Act. No distinct integral part of the defendants' income was referable to Kingston. The ultimate profit (if any) of the whole business of the Com-

pany represents the year's taxable income. Kingston was not a branch at which any sum arbitrary or otherwise could be assessed as "income." The argument *ab inconvenienti* applies cogently to exclude "income" as an item of "personal property" to be assessed at a "branch" which is entirely in subordination to the principal seat of business.

McCarthy, Q.C., and *Bruce*, Q.C., for the defendants.

Walkem, Q.C., and *Langton*, for the plaintiffs.

FERGUSON, J.]

MACKLIN *v.* DOWLING.

Sale of lands—Title—Private Acts—Equitable interest in mortgage.

On a reference as to title in a specific performance action, it appeared that one E. N. H. in 1861, through the Canada Agency Association, agreed to advance to certain mortgagors $7,430 at interest; that the Association agreed with E. N. H. to become liable to her for interest at 7 per cent. per annum on this sum, and in consideration of this was to receive to its own use all interest above that rate, and that the security for the money should be vested in trustees. Accordingly the mortgage, which bore date May 4th, 1861, was made to T. G. R. and D.B., trustees appointed by the Directors of the Association. On January 23rd, 1869, 32 Vict., c. 62, s. 5 O. was passed, whereby all lands, mortgages, securities, etc., held by trustees of the Association were vested in the Colonial Securities Company, and on September 23rd, 1872, the mortgagor released his equity of redemption to the Colonial Securities Co., in full satisfaction of the mortgage moneys, but not so as to merge the mortgage. On March 29th, 1873, 36 Vict. c. 121, s. 5 O. was passed, whereby all lands, mortgages and securities of the Colonial Securities Company were vested in the Colonial Trusts Corporation. On Jan. 12th, 1878, the Colonial Trusts Corporation conveyed the lands to the plaintiff, the present vendor.

Held, that the above Acts could not have the effect of operating the destruction of the rights of E.N.H., as *cestui qui trust*, whose right, if the moneys advanced had not been repaid, would be (she adopting the transaction of the trustees in taking the release) to the land, or to the mortgage plus the equity of redemption in case there was no merger. There was, therefore, an equitable interest outstanding, if E. N. H.'s claim had not been satisfied, and this interest was not necessarily a matter of encumbrance or conveyancing but of title.

Bruce, Q.C., for the plaintiff.

Bicknell for the defendant.

Full Court.] [June 21.

QUEEN *v.* BUNTING.

QUEEN *v.* CREIGHTON.

Criminal procedure—Jurisdiction — Chancery Divisional sittings—Application to move absolute a rule nisi in a criminal matter.

Per BOYD, C.: The Divisional Sittings of the Court are now the equivalent for the former sittings in full Court in term at common law, or for the purpose of rehearing in Chancery, and the criminal jurisdiction vested in the High Court, not exerciseable by a single judge is, by the effect of legislation, to be administered by Judges composing these Divisional Courts. Each division is to follow the same practice, and therefore the Chancery Division is empowered to use the criminal practice and procedure, which was formerly peculiarly limited to the common law courts.

Per FERGUSON, J.: Bearing in mind the provision (Cons. R., 218), under which the sittings of the Chancery Divisional Court at the time of this application were taking place, it had not the power to exercise the full jurisdiction of the High Court, such as it would have possessed if sitting under the provisions of the original Marginal Rule 480, s-s. (a) and (b), and had not a criminal jurisdicton. The other divisions of the High Court are not in the same position with regard to criminal jurisdiction.

Hellmuth for the motion.

W. R. Meredith, Q.C., and *Hamilton Cassels*, contra.

Full Court.] [June 30.

ABELL *v.* MORRISON.

Registry Act—Notice—Relief on ground of mistake—Subrogation.

On December 19th, 1887, the plaintiff registered a lien against certain lands. On the day before, the defendant, an intending purchaser, had searched the registry, and found only two incumbrances registered against the property.

On December 22nd, the defendant completed his purchase, and, having paid off the said two incumbrances, requested discharges thereof, with his deed of purchase, but as he did not make a further search, he did not discover the plaintiff's lien.

Held (affirming the decision of FALCONBRIDGE, J.), that the defendant was entitled to stand in the place of the incumbrancers, whom he had paid off, and to priority over the plaintiff's lien.

The defendant did not mean to give priority to the plaintiff's lien, of which he knew nothing in fact. The Registry Act, which declares (s. 80) that registration shall constitute notice, does not preclude enquiry as to whether there was knowledge in fact; and the Court was not compelled as a conclusion of law to say that the defendant had notice of what he was doing, and so could not plead mistake.

Langton, Q.C., for the motion.

Moss, Q.C., and *McKay*, contra.

Full Court.] [June 30.

KEYES *v.* KIRKPATRICK.

Reference—Action by creditor obtaining leave under R.S.O., 1889, c. 124, s. 7, s-s. 2—Compromise arrived at by assignee.

This was an action to set aside a bill of sale brought by a creditor, in the name of an assignee for creditors, the plaintiff having obtained an order under R.S.O., c. 124, s. 7, s-s. 2, enabling him to bring the action, the assignee being willing to bring it.

It appears that after service of the notice of motion for the order giving permission to bring the action, but before the order, the assignee believing that he had authority to do so, and with the approval of the inspectors, made a settlement with the defendants, in whose favor the bill of sale had been made, which settlement also it appeared was advantageous to the estate.

Held, that the settlement arrived at must be held good, and the judgment dismissing the action should be affirmed.

Du Vernet for the plaintiff.

W. Cassels, Q.C., for the defendant.

Full Court.] [June 30.

STRAUGHAN *v.* SMITH.

Seduction—Action by brother—loss of service—Infant defendant—Non-appointment of guardian—Cons. R. 261. 313.

In an action for seduction, it appeared that the plaintiff was the brother of the girl seduced; and that the girl, though in the service of another lady, yet (by agreement with her mistress entered into at the time of her engagement), was at liberty to perform, and did perform certain services at home for the plantiff.

Held, that the plaintiff was entitled to maintain the action.

It also appeared that the defendant was not quite of age, and that no guardian had ever been appointed, but that the fact of infancy was well known to the defendant's parents, and to the solicitor and counsel who appeared for him at the trial, and no objection on this ground was taken till this motion before the Divisional Court.

Held, that under Rules 261 and 313, the appointment of a guardian was not imperative; the Court had a discretion, and in this case refused to interfere with the judgment obtained against the defendant at the trial.

Bruce, Q.C., for the defendant.

Carscallen, Q.C., for the plaintiff.

Full Court.] [June 30.

MARTIN *v.* MAGEE.

Vendor and purchaser—Devolution of Estates' Act—Devisee of land—Payment of debts—Beneficial interest.

Held, that where one dies, since the Devolution of Estates' Act, leaving a will, devising lands, the lands devolve upon the executors of the deceased as assets for the payment of debts; when these are paid (or there being no debts), the executors will hold the bare legal estate for the devisee of the land. In other words, subject to the payment of debts, the beneficial interest in the land passes to the devisee, and she can make title as the real owner. If the payment of the debts will exhaust the land and other assets, there is no beneficial interest, but if the debts fall short of this in amount, the matter is in practically the same condition as with regard to any other incumbrance, *i.e.*, upon the charge or incumbrance being satisfied (which can be done out of the purchase money), the clear title can be conveyed.

E. D. Armour and *D. Macdonald* for the plaintiff.

Hoyles, Q.C., and *Chisholm*, for the defendant.

Full Court.] [June 30.

MORRIS *v.* MARTIN.

Interpleader issue—Mortgage of goods to secure wife barring dower—Payment of money into Court to abide further order.

In an interpleader issue in respect to goods (which had been sold pending proceedings) it appeared that they had been included in a chattel mortgage given to the defendant to the issue for the purpose of securing her against loss, damage, costs, etc., that she might sustain or be put to by reason of her executing certain mortgages for the purpose of barring her dower.

Her husband was still living, so that it did not appear that she had yet sustained any such loss or damage.

Held, that the money, the proceeds of the goods, must remain in Court to abide further order, so that the defendant would have the same security that she had by the mortgage, and if she should not become entitled to the money, it would be available to her husband's creditor, the owner of the goods mortgaged.

Moss, Q.C., for the defendant.

C. J. Holman contra.

Full Court.] [June 30.

WELLBANKS *v.* HENRY.

Fraudulent preference—Agreement to supply material for manufacture, the goods manufactured nevertheless to remain property of the supplier of the material—Defeating and delaying creditors.

Interpleader issue.

The claimant agreed with A., an insolvent, in writing, to furnish material to the latter for the manufacture of carriages from time to time, for the period of one year; it being also provided that no property, title, interest or ownership in said goods or merchandise should pass to, vest in or belong to A., but that notwithstanding any improvement, or work upon the same, or change of form, or addition thereto, or use thereof, the same and every part thereof, should be, and remain the goods and property of the plaintiff.

The material was supplied and manufactured into carriages by A., which were seized by the defendants', execution creditors of A., and the claimant claimed the same, more being owing to him for the material supplied than the value of the goods seized.

Held, reversing the decision of ARMOUR, C. J., that the above agreement was not one which could be said necessarily to have effect by defeating or delaying creditors, and in the absence of fraud, the claimant was entitled to succeed on this issue.

C. H. Widdifield for the claimant (plaintiff). *Alcorn* for the defendants.

Practice.

Ct. of App.] [June 28.

MARITIME BANK *v.* STEWART ET AL.

Bankruptcy and insolvency—English Bankrupt Acts, scope of—Canadian creditors proving claim in England—Staying actions in Ontario—Discretion—Duration of stay.

The order of the Queen's Bench Divisional Court, 13 P. R., 262, affirming the order of ROSE, J., ib. 86, staying proceedings, was affirmed on appeal.

HAGARTY, C. J. O., and MACLENNAN, J.A., were of opinion that the order was properly made.

BURTON and OSLER, JJ. A., were of opinion that as an exercise of discretion it could not be interfered with.

BURTON and MACLENNAN, JJ. A., were also of the opinion that the order should be varied by making the stay "until further order," instead of "for ever."

Robinson, Q.C., and *Gormully*, Q.C., for the appellants.

McCarthy, QC., and *A. Ferguson*, Q.C., for the respondents.

Chy. Div'l. Ct.] [June 30.

DOMINION BANK *v.* BELL.

Examination—Right of witnesses to presence of counsel—Special circumstances.

In an action against the maker and indorser of a promissory note, judgment went by default against the indorser, but the maker appeared, and upon the consent of the plaintiffs obtained an order under Rule 566, per the examination, before a special examiner, of the indorser and his book-keeper before delivery of defence, the object being to show that the in-

dorser alone was liable on the note, that he procured it by fraud from the maker, and that the plaintiffs held it with notice.

Held, that the interests of the indorser as a party might be affected by the examination, and that he was entitled to have counsel present upon the examination to protect his interests.

Shepley, Q.C., for the defendant Bell and the witness Callaghan.

C. Millar for the defendant Jay.

J. D. Montgomery for the plaintiffs.

Law Society of Upper Canada.

LAW SCHOOL—HILARY TERM, 1890.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in hte Law School.

CURRICULUM OF THE LAW SCHOOL.

Principal, W. A. REEVE, Q.C.

Lecturers, E. D. ARMOUR. A. H. MARSH, LL.B.

Examiners, R. E. KINGSFORD, LL.B. P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto, are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1890, fourteen Scholarships in all will be offered for competition, seven for those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School:

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be deliver d by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively. On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

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THE BILLS OF EXCHANGE ACT, 1890.

This new Act, which is a codification of the *Lex Mercatoria* on bills of exchange, cheques, and promissory notes, gives in less than one hundred sections a complete code on that useful and general branch of law. And from a comparison of the laws of different nations on the subject of bills of exchange, it has been truly said that these laws show that in the municipal jurisprudence of every commercial nation there are general principles common to all nations, which constitute an international code, upon which the law of bills of exchange rests, and which establish a universal jurisprudence administered by all tribunals. These principles, having their origin in the customs and practice of mercantile communities, are deemed so proper in themselves as to be of universal obligation; and are held in the absence of any local statutable or positive regulations, to govern cases affecting bills of exchange; while the general deductions of natural law, and the law of nations, as well as those of the Roman Law, are often resorted to in order to expound and enforce them. It has, therefore, been truly said that a bill of exchange is the most cosmopolitan of all contracts; and that the law respecting negotiable instruments is, in a great measure, not the law of a single country only, but of the whole commercial world: *Per* Story, J., in *Swift* v. *Tyson*, 16 Peters, 1.

From the advance sheets of a new work on the "Bills of Exchange Act, 1890," by Thomas Hodgins, Q.C., we are enabled to extract the following references to the controlling effect of mercantile customs in modifying or reversing the rules of the common law, and as further illustrating the power of merchants to frame usages and customs of the trade which are recognized and enforced as law by the Courts.

The *Lex Mercatoria*, or law-merchant, is sometimes spoken of as a fixed body of law, forming part of the common law, and as if it were coeval with it. But as a matter of legal history, this view is altogether incorrect. The law-merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of Law, which, upon such usages of merchants being proved before them, have adopted them and declared them to be settled law, with a view to the interest

of trade and the public convenience. In thus legalizing mercantile usage, the Courts have proceeded on the well-known principle of law that, with reference to transactions in the different departments of trade, it may be assumed that the parties have dealt with one another on the footing of some custom or usage, prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it: *Per* Cockburn, C.J., in *Goodwin* v. *Robarts*, L. R. 10 Ex. 346. "When a general usage has been judicially ascertained and established," says Lord Campbell, "it becomes a part of the law-merchant, which the Courts of justice are bound to know and recognize, and justice could not be administered if evidence were required to be given *toties quoties* to support such usages:" *Brandao* v. *Barnett*, 12 C. & F. 805.

The universality of a usage voluntarily adopted between buyers and sellers, is conclusive proof of its being in accordance with public convenience. An illustration of the efficacy of usage is to be found in the modern English banking system. It is notorious that, with the exception of the Bank of England, the system of banking has undergone an entire change. Formerly the banker issued his own notes in return for the money of the customer deposited with him. Now the customer is given credit in account, and may draw upon the banker, by what is now called a cheque, payable to bearer or order. Upon this state of things the general course of dealing between bankers and their customers has ingrafted usages previously unknown; and these by the decisions of the Courts have become fixed law. Thus, while an ordinary drawee of a bill of exchange, although in possession of the funds of the drawer, is not bound to accept, unless by his own agreement or consent, the banker, if he has funds of the drawer, is bound to pay cash on presentation of a customer's cheque, payable on demand. Even the admission of funds is not sufficient to bind an ordinary drawee, while it is sufficient with a banker; and money deposited with a banker is not only money lent, but the banker is bound to repay it when called for by the cheque or draft of the customer. Besides this peculiar custom, other customs and usages have grown up between bankers and customers, and between bankers themselves, by which they become bound, and to which the Courts have given the sanction of law. Bills of lading may also be referred to as an instance of how general mercantile usage may give effect to a writing which, without it, would not have had that effect at common law. It is from mercantile usage, as proved in evidence, and ratified by judicial decision, that the right to pass the property in goods by the assignment of bills of lading is derived: *Lickbarrow* v. *Mason*, 2 East 70.

The history of the *Lex Mercatoria* also illustrates the controlling effect of mercantile usage in the assignment of bills and notes from one person to another. In the early days of the common law, great judges declared that the assignment or transfer of *choses in action* was unlawful, because they "would be the occasion of multiplying contentions and suits, and be great oppressions of the people," (10 Co. R. 48); and they interdicted such assignments as being infected

with a taint of maintenance. But prior to such declaration of the common law, merchants had established the usage of transferring bills of exchange (which were also *choses in action*), from hand to hand, by delivery, or by the simple writing of a name on the bill, which assigned at once the right of action, and gave an unwritten contract of guarantee, to the holder of the bill, in silent disregard of both the judicial declaration of the common law, and the legislative prohibition of the Statute of Frauds. The rights of property and the contract liabilities thus established by the custom of merchants, respecting this class of *choses in action*, and the necessity of recognizing bills and notes as part of the negotiable currency of the community, silently incorporated these usages and customs into the common law as part of the *lex mercatoria*, and compelled the harshness of the common law to give way to the more common-sense usages of merchants. But it was not until 1872, that these rules of the *lex mercatoria* were extended to all other classes of *choses in action* by the Ontario Act, 35 Victoria, chapter 12, (now R. S. O. 1887, c. 122 s.s. 6-13).

Another illustration of how mercantile usage has displaced the common law, may be shown in the practice of the Courts, by which a bill of exchange or promissory note, though classed by the common law as a "simple contract," bears on its face the proof of its value in money. No such privilege is allowed to ordinary simple contracts, for the money or other valuable consideration given for them is not presumed, but must be proved. But the specialty or more formal contracts under seal, carry with them the internal evidence of their being made for valuable consideration. Thus by the usage of merchants, the legal privilege of specialty contracts has been conceded by law to bills and notes, for the better facilities of trade and finance ; and for the further reason that these negotiable securities have become part of the recognized currency of the country, in commercial and financial transactions.

This process of law-making has been termed legislation by the judiciary mode, to distinguish it from the ordinary legislative process by which the general laws of a nation are enacted. And as this judicial law has been from time to time formed by judges under the eyes of the sovereign legislature, or has been acquiesced in by its recognition in various statutes, it thereby becomes law by the acquiesence and authority of the sovereign government.

Referring to the mode by which a law is derived from custom or usage, Austin says: "Independently of the position or establishment which it may receive from the sovereign, the rule which a custom implies (or in the observance of which a custom consists), derives the whole of its obligatory force from these concurring sentiments. which are styled Public Opinion. Independently of the position or establishment which it may receive from the sovereign, it is merely a rude morally santioned, or a rule of positive or actual morality. It is properly *jus moribus constitutum* ; its only source, or its authors, are those who observe it spontaneously, or without compulsion by the State."

"Law, styled customary then, is not to be considered a distinct kind of law. It is nothing but judiciary law founded on an anterior custom. As merely customary law (in the loose and improper sense of the term 'law'), or rather as

merely positive morality, it comes immediately from the subject members of the community, by whom it was observed spontaneously, or without compulsion by the State. But as positive law, it comes immediately from the sovereign, through subordinate judges, who transmute the moral and imperfect custom into legal and perfect rules:" 2 Austin's Jurisprudence, 553 and 555. On a prior page (p. 548), he distinguishes these processes as "law established in the *legislative* manner," and "law introduced and obtaining *obliquely*," or "law established or introduced in the way of *judicial* legislation." But elsewhere he combats the use of the term "judge-made law."

But it was not without a struggle that the merchants succeeded in compelling the Judges to recognize their customs and usages. Lord Holt, C.J., was, as his reporter states, *totis viribus*, against some of the customs of merchants which he said "proceeded from obstinancy and opinionativeness." And in refusing to hold that a promissory note payable to bearer was valid or negotiable, he said: "It amounted to setting up a new specialty, unknown to the common law, and invented in Lombard street, which attempted in these matters of bills of exchange to give laws to Westminster Hall." And in another case he denounced "the noise and cry that such is the usage of Lombard street, as if a contrary opinion would blow up Lombard street:" 2 Lord Raymond's Reports, 758 and 930. The matter was finally settled by Parliament in favor of the contention of the merchants, by the Act 3 & 4 Anne, c. 9.

But the merchants ultimately became the victors in the struggle to engraft their usages and customs on the common law, mainly through the great assistance of Lord Mansfield, who has been justly styled "the founder of the commercial law of this country," (2 East 73); and judges have had to concede that the custom of merchants is now part of the common law, and that the Courts will take notice of it *ex officio*.

The results of this formation of the law by custom are instructive; for this law of trade usage and custom now controls all negotiable instruments alike, whether they are the contracts of traders or non-traders. The English usage may be called the Banking or Currency theory, as opposed to the French or Mercantile theory. A Bill of Exchange in its origin was an instrument by which a trade debt, due in one place, was transferred to another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England, bills have developed into a perfectly flexible paper currency. In France, a bill represents a trade transaction; in England it is merely an instrument of credit. English law gives full play to the system of accommodation paper; French law endeavors to stamp it out. A comparison of some of the main points of divergence between English and French law will show how their two theories are worked out. In England it is no longer necessary to express on a bill that value has been given, for the law raises a presumption to that effect. In France the nature of the value must be expressed, and a false statement of value avoids the bill in the hands of all parties with notice. In England a bill may now be drawn and payable in the same place. In France the place where a bill is drawn must be so far distant from the

place where it is payable, that there may be a possible rate of exchange between the two. A false statement of places, so as to evade this rule, avoids the bill in the hands of a holder with notice. As French lawyers put it, a bill of exchange necessarily presupposes a contract of exchange. In England since 1765, a bill may be drawn payable to bearer, though formerly it was otherwise. In France it must be payable to order; if it were not so, it is clear that the rule requiring the consideration to be expressed would be an absurdity. In England a bill originally payable to order, becomes payable to bearer when endorsed in blank. In France an endorsement in blank merely operates as a procuration. An endorsement to operate as a negotiation must be an endorsement to order, and must state the consideration; in short, it must conform to the conditions of an original draft. In England if a bill be refused acceptance, a right of action at once accrues to the holder. This is a logical consequence of the currency theory. In France no cause of action arises unless the bill is again dishonored at maturity; the holder in the meantime is only entitled to demand security from the drawer and endorsers. In England a sharp distinction is drawn between current and overdue bills. In France no such distinction is drawn. In England no protest is required in case of an inland bill, notice of dishonor alone being sufficient. In France every dishonored bill must be protested. Grave doubts may exist as to whether the English or the French system is the soundest and most beneficial to the mercantile community; but this is a problem which is beyond the province of a lawyer to attempt to solve: Chalmers, Digest of the Law of Bills and Exchange, p. xlv.

The little document which has originated this universal code of mercantile law, and has controlled judges in administering, and legislatures in enacting, the laws respecting it has been thus described: A bill of exchange is commonly drawn on a small piece of paper and is comprised in two or three lines; but is so noble and excellent, that it is beyond or exceeding any specialty or bond in its punctuality and precise payment; for if once accepted it must be paid when due, otherwise the acceptor loses his credit:" Beawes' *Lex Mercatoria*, 561.

LIABILITY FOR INJURIES BY MISCHIEVOUS ANIMALS.

THE case of *Shaw* v. *McCreary* (19 Ont., 39), which was recently disposed of by the Chancery Divisional Court, involves some very nice questions of law. The action was brought by the plaintiffs against a man and his wife, to recover damages for injuries sustained from a bear, which escaped from the defendants' premises. The husband was the owner of the bear, and had brought him to the premises where he and his wife lived, and which belonged to her, and on which she carried on a separate trade. The bear was kept in the back yard of those premises, with the wife's assent, or, at all events, without any effective objection on her part. It escaped into the highway, where it made the attack, which resulted in the injuries complained of in the action. At the trial, on it appearing that the husband was the owner of the animal, Sir Thomas Galt, C.J.C.P., withdrew the case from the jury as to the wife, and dismissed the action as against her. From

this judgment the plaintiffs appealed, and the Divisional Court has ruled that the case as against the wife should have been left to the jury, and a new trial was ordered as to her, unless she consented to a verdict being entered against her jointly with her husband, for the amount awarded against her husband. The Divisional Court was of opinion that the fact that the wife suffered the bear to remain upon her premises made her equally responsible with the owner, her husband, for its safe keeping. We believe that in this respect this case carries the law beyond any previous decision that is to be found in the books. The relationship of husband and wife would formerly have protected her from all liability, and it certainly does not now, even under the altered state of the law as to the wife's capacity to hold property, impose on the wife any greater liability than if she were a stranger to her husband. She is held liable because the law has given her the same dominion over her separate property as she would have if a *femme sole*, with all the responsibilities which that dominion entails; and one of those responsibilities the Court has determined to be the due keeping of any wild animals she suffers to be brought upon her property. This is an effect of the Married Women's Property Act which was hardly contemplated.

This liability, if it exists, is not confined to married women, but must be one that is common to all persons who permit wild animals to be brought upon their premises; *e.g.*, an inn-keeper who takes in a strolling tramp and his dancing bear would appear, under this decision, to be responsible, not only for any injury the bear may do while on his premises, but also for any injury it may do off his premises, should it break loose in the night. This is, as we have said, an extension of the law of liability for damages occasioned by wild animals beyond any previous decision; and it is worthy of consideration whether the principle which is laid down in this case is a sound one, and a legitimate development of the previous decisions on the subject. There is a passage in the judgment of Lord Tenterden, C.J., in *McKone* v. *Wood*, 5 C. & P., 2, which seems to give some support to the view which has been adopted by the Divisional Court. The facts are very meagrely reported, and it is not apparent whether the biting in that case took place on the defendant's premises or off them; but assuming that it took place of them, there was evidence that the defendant kept the dog: and Lord Tenterden, C. J., said, "It is immaterial whether the defendant is the owner of the dog or not. It is enough for the maintenance of the action that he keeps the dog; and the harboring of a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support the action; as soon as a dog is known to be mischievous, it is the duty of the person whose premises the dog frequents to send him away, or cause him to be destroyed." But it is obvious this *dictum* could not be very well applied to the case of a bear, because to "send him away" without an efficient escort would produce the same results, probably, as have arisen from his escaping without the will of his owner, or the proprietor of the premises.

It would, moreover, appear that when Lord Tenterden spoke of keeping a dog about one's premises, he can hardly be intended to imply that the liability

depends on the question of the actual ownership of the land on which the animal is harbored. He must be understood as referring to a man's premises, as they are understood in the colloquial and not the strictly legal sense, *i.e.*, the premises on which a man lives or carries on his business, though they may, in no strictly legal sense, be his. It could hardly be supposed that if a man leases land from another, for the purpose of keeping a menagerie, that he thereby imposes on his landlord a liability for any damage which his wild animals may do by escaping from the demised premises. Where a weekly tenant used the demised premises for the purposes of a brothel, and paid an increased rent to the landlord in consequence of the immoral use which he made of the premises, it was nevertheless held that the landlord was not liable for the act of the tenant, and the fact that he did choose to not give him notice to quit made no difference: *Regina* v. *Barrett*, 32 L.J.M.C., 36; *Regina* v. *Stannard*, 33 L.J.M.C., 61.

Not long ago there existed on one of the principal streets in Toronto a menagerie in which lions and tigers, and other ferocious animals, were kept caged up. Assuming that the premises were leased for the purpose, could it be held that the lessor was responsible for any damage which might have been done by any of these animals escaping? It is not uncommon, too, for persons to lease land to travelling circuses and menageries; do they, thereby, become responsible for any damage which the animals may do in case they break loose from the demised premises? We should think not, because the premises are, for the time being, the premises of the lessee, and he alone is answerable for what he may put thereon.

But does the case of a husband, living with his wife upon her premises, stand in any different position? Are not the wife's premises for the purpose of keeping anything he may choose to bring upon them, to be deemed the husband's premises? Can he be said to be in any different position than a tenant at sufferance? He is there lawfully by the consent of the owner, and, being there, he brings upon the premises a wild animal; if he were in sole possession, his wife could hardly be held responsible because she happened to be the rightful owner of the property, and it is somewhat difficult to see why a more extended liability can arise merely from the fact that she happens to be also living on the property and carrying on her own business there. The Divisional Court appears to have based the liability of the wife on the fact of her ownership of the property on which the bear was kept, coupled with the fact that she did not actively oppose her husband's keeping it there. But it seems open to doubt whether this is the proper test of liability in such cases. Suppose a person demised a house to a tenant, who used it as a boarding house, and the landlord boarded with the tenant; and a fellow boarder brought and kept a bear upon the premises; would the landlord and tenant be responsible for the bear's safe keeping? According to the decision of the Divisional Court it is difficult to see how both the landlord and tenant could escape liability under such circumstances, unless they actively resisted the retention of the animal upon the premises.

The observations of Lord Tenterden, C.J., which have been referred to, were made upon a motion in arrest of judgment, it being alleged in the declaration

that the defendant kept the monkey, which caused the injury complained of, but did not allege that he was the owner of it, and it is possible they are intended to be confined to the case of injuries committed by the animal upon the premises upon which it is kept or harbored. If, for instance, in the case under consideration, a person visiting at the female defendant's house had been injured by the bear there would appear to be some reason in holding her immediately liable to the person injured for such an injury, leaving her to her remedy over against the owner; but even this view may seem somewhat hard to support on principle. Suppose a friend visits the house of a neighbor accompanied by a dog known by the neighbor to be savage, but the latter suffers the dog to remain on his premises and takes no active steps to drive him away or destroy him, and the dog bites some person while he is on the neighbor's premises. Does the mere fact of the ownership of the premises where the injury takes place determine the question of the liability for the injury? *Smith* v. *Great Eastern Railway Co.*, L.R. 2, C.P. 4, would seem to show that it does not. In that case a stray dog came upon the defendant's premises and bit the plaintiff. The dog had previously been on the defendant's premises earlier in the day and had torn a person's clothes, and had been driven away but had come back again. And it was held the defendants were not liable, and it certainly seems going rather too far to say that the mere suffering of another to keep a wild animal on one's premises involves a responsibility, not only for the damages which it may occasion while actually on the premises, but also for any damages it may do off the premises in case it breaks loose. Upon this point a passage in the judgment of Lord Denman, C. J., in *May* v. *Burdett* 9 Q.B., 101, seems in point. He says: "It was said indeed further on the part of the defendant that the monkey, being an animal *feræ naturæ*, he would not be answerable for injuries committed by it, if it escaped and went at large without any default on the part of the defendant, during the time it escaped and was at large, because at that time it would not be in his keeping nor under his control. . . . We are of the opinion . . . that the defendant, if he would keep it, was bound to keep it secure at all events."

From this it is clear that the Court considered the keeper responsible for the animal being safely kept, but in that case the defendant was the person who was both the keeper of the animal and the owner or occupier of the premises on which it was kept, and the question which has arisen in *Shaw* v. *McCreary* as to whether a person who permits a wild animal to be brought on his premises by another is to be deemed to assume the responsibilities of being its keeper, did not arise and was not of course adjudicated upon. The case was compared by one of the learned judges in the Divisional Court to the penning back of water upon one's land, and then suffering it to escape to the damage of others, but the parallel appears to be incomplete. If through the act of some adjoining proprietor a quantity of water were lodged on a person's land, and then by the breaking of some natural bank or dam, the water spread over the adjoining lands to the damage of the owners thereof, that would, it appears to us, be more nearly parallel, and in such a case we do not think there would be any liability for the injury on the part of him on whose land the water had originally lodged. In

such cases there must be the doing of some wrongful act, or the wrongful neglect of some duty. The mere permission to bring a bear upon one's premises is not *per se* a wrongful act, the wrong is occasioned by the neglect of the owner or keeper of the animal safely to keep it, so that it may not do harm. That appears to be a wrong for which the owner or keeper of the animal alone is responsible, and not the person who merely passively permits him to use his land on which to keep it.

In the case under consideration the wife virtually said to her husband, "I will permit you to use my land on which to keep your bear, but you are to keep it, not I." The Court, however, has stepped in and said that if she permits her husband to use her land for such a purpose she must also assume the duty of bear keeper herself.

We have suggested one or two instances where this rule would seem difficult to reconcile with sound principles, let us instance one more case. Suppose instead of a bear the husband had brought into the house a loaded gun, which he left so carelessly and negligently about that, like the bear, it went off and injured a man, would the wife be liable for the injury? If she is liable for the bear going off without leave, owing to her husband's negligence, why should she not be equally liable for his gun going off too, through his negligence? This, and many other questions might be propounded, but it is easier to propound questions sometimes than to give them a satisfactory solution.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for July comprise 25 Q.B.D., pp. 1-192; 15 P.D., pp. 121-135; 44 Chy.D., pp. 217-329; and 15 App. Cas., pp. 201-251.

PRACTICE—STAYING ACTION—LIBEL—SECOND ACTION FOR SAME PUBLICATION—RES JUDICATA—FRIVOLOUS AND VEXATIOUS ACTION.—PUBLICATION OF PART OF JUDICIAL PROCEEDINGS.

Macdougall v. *Knight*, 25 Q.B.D., 1, is one instance; and *Laurance* v. *Norreys*, to which we shall refer later on, is another, of the power the Court sometimes exercises to put an end in a summary way to frivolous and vexatious litigation. This was a second action for libel in respect of the same publication as was in question in *Macdougall* v. *Knight*, 17 Q.B.D., 636, and 14 App. Cas., 194 (noted *ante* vol. 22, p. 395, and vol. 25, p. 492). The libel complained of was the publication by the defendant of a verbatim report of a judgment of North, J. But in this action the plaintiff selected other passages than those objected to in the former action as being libellous. The defendant moved to strike out the statement of claim, and to dismiss the action as frivolous and vexatious, and an order was made to that effect by the Master, and confirmed by the Judge at Chambers. On appeal to the Divisional Court (Lord Coleridge, C.J., and Mathew, J.), the latter made an order that if the balance of the costs of the former action were paid within a week, the appeal should be allowed; but if not, the action should be stayed until the costs of the former action were paid. The defendent appealed from this order, and the Court of Appeal (Lord Esher, M.R., and Fry and Lopes,

L.JJ.) were of opinion that the order was wrong, that notwithstanding the plaintiff had objected in this action to different passages from those complained of in the former action, the case was *res judicata*, and that the action was therefore frivolous and vexatious, and should be stayed. We may observe that the Court of Appeal regarded the law as laid down by that Court in the former case (17 Q.B.D., 636), to the effect that the publication of the judgment of a court of law is privileged and therefore not actionable, as unaffected by the decision of the House of Lords, 14 App. Cas., 194, notwithstanding the doubts expressed by some of their Lordships.

PRACTICE—RECOVERY OF SPECIFIC PROPERTY, OTHER THAN LAND—LIEN—SECURITY—PAYMENT INTO COURT—ORD. L., R. 8 (ONT. RULE 1136).

In *Gebruder Naf* v. *Ploton*, 25 Q.B.D., 13, the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) were called on to construe Ord. l., r. 8 (Ont. Rule 1136), and came to the conclusion (affirming Huddleston, B., and Grantham, J.) that under that Rule, in order to entitle the plaintiff to the delivery up of the specific goods in question, he must pay into Court not merely the value of the goods, but the whole amount for which the defendant claims a lien thereon, even though it exceeds the value of the property.

BILL OF SALE—HIRING AND PURCHASE AGREEMENT.

In re Watson, 25 Q.B.D., 27, an attempt was made to evade the Bills of Sale Act by a transaction which purported to be a sale of chattels followed by a hiring and purchase agreement, whereby the vendor agreed to hire the chattels from the purchaser, and to pay quarterly sums for such hire, until a certain amount was paid, when the chattels were again to become the property of the vendor, and power was given to the purchaser to take possession on default in payment. It appeared, however, that no sale or hiring was really intended, and that the real object was to make a security for a loan of money to the supposed vendor from the supposed purchaser. The Court of Appeal (Lord Esher, M.R., and Cotton, Lindley, Fry, and Lopes, L.JJ.) under these circumstances affirmed Cave and Lawrance, JJ., in holding that the transaction was void for non-compliance with the Bills of Sale Act.

LANDLORD AND TENANT—COVENANT—"GOOD TENANTABLE REPAIR," WHAT IS.

In *Proudfoot* v. *Hart*, 25 Q.B.D., 42, the question was, what was the meaning of a covenant contained in a lease to keep a house in good tenantable repair, and so leave the same at the expiration of the lease. The Court of Appeal (Lord Esher, M.R., and Lopes, L.J.) were agreed that it was immaterial whether the premises were, or were not, in repair when the term began, and that if they were not in repair it was the duty of the covenantor to put them in repair, and that good repair or tenantable repair is such repair as having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it. The dispute in this case was as to the liability of the

covenantor to paper and paint and whitewash the premises, and the test to be applied in the opinion of the Court is this, whether the paint, papering, and whitewashing are in such a condition (having regard to the considerations aforesaid) as to be reasonably fit for the occupation of a reasonably-minded tenant of the class likely to take it. If they are, the covenant is answered; if not, then it is broken.

GIFT—CHATTEL CAPABLE OF DELIVERY—PASSING PROPERTY TO DONEE.

The point decided in *Cochrane* v. *Moore*, 25 Q.B.D., 57, by the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.), after an elaborate discussion, is simply this, that a verbal gift cannot be made *inter vivos* of a chattel capable of delivery, unaccompanied by an actual delivery, even though the donee assent to the gift, and his assent is communicated to the donor. The subject of the alleged gift in the present case was a fourth interest in a horse, then in the custody of a third person. The donor informed this person of the gift, but did not tell the donee that he had done so, nor did the latter know of the communication. Subsequently the donor included the horse in a bill of sale, under which the horse was sold, and the alleged donee now claimed one-fourth of the proceeds as against the person claiming under the bill of sale. Lopes, L.J., before whom the issue was tried, held that delivery was not indispensible to the validity of the gift. This, their Lordships held, in appeal, was contrary to the doctrine laid down by Tinterden, C.J., in *Jones* v. *Smallpiece*, 2 B. & A., 551, and many other cases, that a verbal gift of chattels, unaccompanied by delivery of possession, passes no property to the donee. According to Lord Esher there cannot be a gift of a chattel by parol, without an actual giving by the giver, and an acceptance by the donee of the thing given. The elaborate judgment delivered by Fry, L.J., on behalf of himself and Bowen, L.J., tracing the law on this subject back to its foundation, will well repay perusal. But though the Court was adverse to the defendant's view that there had been a gift, and therefore refrained from going into the discussion as to how delivery of an undivided interest in a chattel can be made, yet it nevertheless decided in his favor, on the ground that what had taken place was, though void as a gift, nevertheless a valid declaration of trust of a fourth interest in the horse, and on the ground that the bill of sale had been obtained by a fraudulent misrepresentation, and was repudiated by the giver of it as soon as he discovered the fraud. As to the question of delivery of an undivided interest in chattels, it may be useful to refer to *Gunn* v. *Burgess*, 5 Ont., 685.

COMPANY—SALE OF SHARES—VOUCHER OF TITLE—ESTOPPEL—ACT ULTRA VIRES—REPRESENTATION AS TO CREDITOR'S ABILITY—SIGNATURE OF PARTY TO BE CHARGED—LORD TENTERDEN'S ACT (9 GEO. 4, C. 14), S. 6 R.S.O., C. 123, S. 7).

Bishop v. *Balkis Consolidated Company*, 25 Q.B.D., 77, is one of that class of cases in which the law suffers a company to do an injury to a third party by the negligence of its officers, with impunity. One Lupton, claiming to be the owner of shares in the defendant company, contracted to sell them to the plaintiffs; the brokers took the document by which it was intended to transfer the shares to the

defendants before it had been executed by the plaintiffs, or the price had been paid, and procured the defendants to place upon it the words, "certificate lodged," with the signature of the secretary. The object of these words was to satisfy purchasers of shares that the vendor had the shares in the company which he purported to sell. Acting upon the faith of this memorandum, the brokers, as agents for the plaintiffs, completed the purchase, and paid over the price. The defendants subsequently discovered that Lupton had no shares, and refused to register the transfer. This action was then brought against the company to recover the value of the shares. But although the facts were found as above, yet it was held the defendants were not liable; first, because the granting of the memorandum or certificate was *ultra vires* of the secretary, and second, because it was a representation as to the credit and ability of Lupton, and was void for not being under seal.

DENTISTS' ACT, 1878—ERASING NAME FROM DENTISTS' REGISTER—ERRONEOUS EXERCISE OF DISCRETION, LIABILITY FOR.

Partridge v. the *General Council of Medical Education*, 25 Q.B.D., 90, was an action brought by a dentist against the General Council of Medical Education to recover damages for having erroneously removed his name from the dentists' register. Under the Dentists' Act the Council were empowered to remove the name of a person who has been guilty of infamous or disgraceful conduct. The plaintiff had been registered as a dentist in respect of a diploma conferred upon him by the Royal College of Surgeons in Ireland. Such diploma was afterwards withdrawn, on the ground that the plaintiff had advertised his business, in breach of an undertaking not to do so, given by him when his diploma was granted. The defendants, on being informed of the withdrawal of the diploma, without calling for an explanation, removed his name from the register. An application for a mandamus to restore his name was made, and it was held that the defendants had acted erroneously, and the plaintiff's name was ordered to be restored to the register; but it was held by the Court of Appeal that the defendants, having a *quasi* judicial discretion, were not liable in damages, though they had exercised it erroneously, in the absence of *mala fides*.

COPYRIGHT—WORK OF ART—WHAT DRAWINGS MAY BE SUBJECT OF COPYRIGHT—ABSENCE OF ARTISTIC MERIT—AUTHOR.

Kenrick v. *Lawrence*, 25 Q.B.D., 99, was an action for infringement of copyright. The plaintiffs were a firm of printers. Jefferson, who was a member of the firm, conceived the idea of printing and publishing cards having a drawing thereon of a hand holding a pencil in the act of completing a cross within a square, with the view to such cards being used for the guidance of illiterate voters at elections in marking their ballot papers. Jefferson, being unable to draw, employed an artist in the service of the firm to make the required drawing, which the plaintiffs registered, and in the memorandum stated Jefferson to be the author of the drawing. Subsequently the defendants published similar cards. The hand was in a slightly different position, but the idea was taken from the plaintiffs' cards. Neither the plaintiffs' nor defendants, drawings were of any

artistic merit. It was held by Wills, J., that the action would not lie on the grounds that the plaintiffs' drawing was so far not the subject of copyright that it was not entitled to protection against an imitation which was not an exact reproduction, and, also, because Jefferson was not the author of the plaintiffs' drawing, and consequently the registration was void.

DAMAGES, MEASURE OF—CONTRACT—WRONGFUL DISMISSAL OF APPRENTICE—FALSE CHARGE OF MISCONDUCT.

In *Maw* v. *Jones*, 25 Q.B.D., 107, the sole question was, as to the proper measure of damages to which the plaintiff was entitled for being wrongfully dismissed from his employment as an apprentice. Under the articles of apprenticeship the defendants had power to dismiss the plaintiff in case he showed a want of interest in his work, on giving him a week's notice. The defendants summarily dismissed the plaintiff for alleged disobedience of orders. The jury found that no grounds existed for the defendants dismissing the plaintiff without notice, but that there were grounds for dismissing him on a week's notice, and the question was whether the damages should be confined to the week's wages, which the plaintiff had lost by reason of his being summarily dismissed. Manisty, J., at the trial, directed the jury that they were not limited to the week's wages, though they might take into consideration the fact that the defendants would have been justified in dismissing the plaintiff under the notice clause; they gave a verdict for £21, which was considerably in excess of a week's wages and the Divisional Court (Lord Coleridge, C.J., and Mathew, J.) held that the verdict could not be disturbed.

MORTGAGE—REDEMPTION—MORTGAGEE'S COSTS—SOLICITOR MORTGAGEE—PROFIT COSTS.

In re Wallis, 25 Q.B.D., 176, the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.), following in the line of the late case of *Re Roberts*, 43 Chy.D., 52, noted *ante* p. 110, held that in the absence of express contract, where a solicitor is mortgagee, he cannot collect from his mortgagor, as part of his costs, charges and expenses incurred as mortgagee, profit costs in respect of professional services rendered by him in proceedings taken by himself as solicitor to enforce the payment of the mortgage debt.

SHERIFF—ACTION FOR TAKING DEFAULTING DEBTOR TO PRISON WITHIN 24 HOURS OF ARREST—32, GEO. 2, C. 28, S. 1—ARREST UNDER DEBTORS' ACT.

In *Mitchell* v. *Simpson*, 25 Q.B.D., 183, the decision of the Divisional Court, 23 Q.B.D., 373, noted *ante* vol. 25, p. 555, to the effect that a judgment debtor arrested by virtue of an order of commitment for non-payment of the debt pursuant to order, is not a person arrested by virtue of "an attachment for debt," and consequently the sheriff may take him to prison within twenty-four hours of his arrest. In short, the Court holds that the prohibition to the sheriff conveying a prisoner to prison until the expiration of twenty-four hours from his arrest only applies to a debtor arrested on *mesne* process.

VENDOR AND PURCHASER—CONTRACT—CONVEYANCE—TITLE—TRUSTEES HAVING NO IMMEDIATE POWER OF SALE—SUBSTITUTION OF VENDOR.

In re Bryant and Barningham, 44 Chy.D., 218, is a decision of the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), affirming a judgment of Kay, J., which shows that where a vendor has entered into a contract of sale, and it turns out that he has no title, he cannot insist on substituting as a vendor the person who has the title, even with the latter's concurrence. In this case the vendors were trustees, and it was objected that they had no immediate power of sale, whereupon they offered to procure a conveyance to the purchaser from the tenant for life, under the Settled Lands Act, but the purchasers declined to enter into any new contract with the tenant for life, and insisted on a return of the deposit; and on an application under the Vendors and Purchasers' Act, it was held that they were entitled to take that position. As Kay, J., puts it, the case is altogether different from that of a vendor having a partial interest agreeing to sell the fee, and subsequently being in a position to obtain a conveyance of the fee to himself; in such a case the Court would enforce the contract, but here the vendors had no power to sell at all, and no interest, and no right to call for a conveyance, and the title of the vendor is not made good by joining with them the persons entitled to sell under the Settled Lands Act.

PRACTICE—ADMINISTRATION—CREDITOR—ANNUITANT.

In re Hargreaves, Dicks v. *Hare*, 44 Chy.D., 236, the short point decided by the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), affirming North, J., is simply this, that an annuitant whose annuity is secured by a covenant of a testator, but which is not in arrear, is not a creditor of his estate so as to be entitled to obtain an administration of the estate, even though the annuity deed provides that the annuity is to be considered as accruing "from day to day by equal quarterly payments."

COVENANT AGAINST CARRYING ON TRADE.

Buckle v. *Fredericks*, 44 Chy.D., 244, was an action to restrain the defendant from carrying on a trade in breach of a covenant not to do so. The facts of the case were that the defendant was lessee of a theatre, and bought an adjoining piece of land which was subject to a covenant, that "the trade of an innkeeper, victualler, and retailer in wine, spirits, or beer," should not be carried on there. On this piece of ground he erected a building which was to furnish convenient egress from the theatre; and on each floor he set up a counter for selling wine, spirits, and beer. This counter could not be approached from the outside, but any person who paid for admittance to the theatre, when open for theatrical performances, could purchase refreshments at these counters. The Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) agreed with Kekewich, J., that this was a breach of the covenant.

PRACTICE—INJUNCTION—UNDERTAKING AS TO DAMAGES.

In *Tucker* v. *New Brunswick Trading Company*, 44 Chy.D., 249, one or two points are made clear as to the practice regarding the undertaking as to damages

which is usually required on the granting of an interim injunction. First, the Court cannot compel an undertaking to be given; all that it can do is to say that if the undertaking is not given, it will refuse to grant the injunction applied for. Secondly, when an undertaking is required, it should extend not only to the damages sustained by the defendant enjoined, but also to those sustained by the other defendants, if any. Thirdly, when a defendant appears for and asks for an undertaking as to damages which is as given, but the order is drawn up with an undertaking confined to the damages sustained by a co-defendant against whom the injunction is granted, the order is erroneous and may be corrected on the application of the defendant who asked for the undertaking, so as to make it apply to damages sustained by him; but it cannot, in such a case, be extended to a defendant who did not appear, and who was not served with notice of the motion, because if imposed as regards him, the plaintiff might have elected not to take the order.

PATENT—INFRINGEMENT—MEASURE OF DAMAGES—LOSS BY REDUCTION IN PRICE BY PATENTEES.

The American Braided Wire Co. v. *Thomson*, 44 Chy.D., 274, was an action for infringement of a patent, and the question was as to the proper measure of damages. The Referee, to whom the action was referred, found that the prices at which the defendants at first sold the patented articles were lower than the plaintiffs' original prices, and that they lowered them from time to time during the period of infringement to meet the competition of the defendants, but never reduced them below defendants' prices for the time being. He also found that but for the defendants' illegal competition the plaintiffs would have made all sales made by the defendants as well as themselves, at the original prices, subject to a percentage for increased sales, caused by the connection and exertions of the defendants, and by reduction of prices. The Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) were of opinion that the plaintiffs were entitled to recover all the profits they would have made if all the sales made by themselves and by the defendants had been made at the original prices, subject to a deduction for the increased sales attributable to the defendants' connection and exertions, and to the reduction of prices. Kekewich, J., who decided that the reduction in price was not a direct consequence of the infringer's act, was therefore overruled. The case was distinguished from the *United Horseshoe and Nail Co.* v. *Stewart*, 13 App. Cas., 401 (*ante* vol. 24, p. 462), on which Kekewich, J., relied, on the ground that there the reduction in price was consequent on general competition, which could not be traced to the wrongful act of the defendant.

COMPANY—ILLEGAL CONTRACT—LOTTERY—ADVERTISING FOREIGN LOTTERY—9, GEO. I., C. 19, S. 4—6, 7, W. 4, C. 66—(R.S.C., C. 159, S. 6).

Macnee v. *Persian Investment Co.*, 44 Chy.D., 306, was an action by a shareholder of the defendant Company, to restrain them from purchasing a concession conferring the exclusive privilege of conducting all operations in connection with lottery loans in Persia, and from issuing a prospectus or advertisements relating to the acquisition of this concession, or to the lottery loans, and from applying

the funds of the Company to the purchase of the concession, on the ground that the enterprise was illegal and in contravention of the Lottery Acts. But it was held by Chitty, J., that the proposed purchase of the concession was lawful; that the Company were not attempting to set up a lottery in England within the meaning of 9, Geo. I., c. 19, s. 4; and the statements in the prospectus did not amount to a publication, advertisement, or notice of a foreign lottery, within the meaning of 6, 7, W. 4, c. 66—(R.S.C., c. 159, s. 6).

EXPROPRIATION OF LAND—PAYMENT OF PURCHASE MONEY INTO COURT—SUBSEQUENT MORTGAGE OF SHARE—PAYMENT OUT—COSTS OF MORTGAGEE.

In re Olives' Estate, 44 Chy.D., 316, money had been paid into Court on an expropriation of land, under a statute. One of the parties interested in the land had subsequently mortgaged his share, and on the application for payment out, the question arose whether the expropriators were liable to pay the mortgagee's costs; and it was held that they were liable therefor, the amount being fixed at 42s.; and it was also held that they were liable for the costs of serving the petition for payment out on the mortgagee.

ARBITRATION—PARTNERSHIP—INJUNCTION.

In *Farrar* v. *Cooper*, 44 Chy.D., 323, although Kekewich, J., admitted the Court had jurisdiction in a proper case to restrain a party from proceeding to arbitration when, for instance, it is clear that injury will result to the party complaining if the arbitration is allowed to proceed; yet he refused to grant an injunction in the present case, because it was obvious that if the contemplated arbitration were proceeded with, it would be futile. The circumstances being that under a partnership deed, containing a clause requiring disputes to be referred to arbitration, two of the partners had appointed arbitrators, and had applied to the plaintiff, the third partner, to appoint his arbitrator, which he declined to do, as he denied the existence of any dispute, and requested the other two partners to furnish him with the particulars of the alleged dispute, which they refused to do until he had appointed his arbitrator; and they threatened if he did not appoint his arbitrator, they would proceed to arbitration before their own arbitrators. These facts, Kekewich, J., held, furnished no sufficient ground for the interference of the Court, for the reason above indicated.

SOLICITOR—COSTS—TAXATION OF PART OF BILL.

In *Storer* v. *Johnson*, 15 App. Cas., 203, the House of Lords affirmed the decision of the Court of Appeal, *In re Johnson, and Weatherall*, 37 Chy.D., 433, noted *ante* Vol. 24, p. 268, to the effect that under its general jurisdiction the Court has power to direct a taxation of part of a solicitor's bill.

STRIKING OUT STATEMENT OF CLAIM—FRIVOLOUS AND VEXATIOUS ACTION—STATUTE OF LIMITATIONS (3 AND 4, W. 4, C. 27), S. 26 (R.S.O., C. 111, S. 31)—PLEADING.

Lawrence v. *Norreys*, 15 App. Cas., 210, has been already referred to. In this case the House of Lords affirmed the decision of the Court of Appeal (39 Chy.D., 228) noted *ante* Vol. 25, p. 78, striking out the claim and dismissing the action.

on the ground that it was frivolous and vexatious. The plaintiff relied on s. 26 of the Statute of Limitations (R.S.O., c. 111, s. 31), which excepts cases of concealed fraud from its operation, and their Lordships held that in such a case general averments of fraud are not sufficient, but that the statement of claim must contain precise and full allegations of facts and circumstances leading to a reasonable inference that the fraud was the cause of the deprivation, and excluding other probable causes, and in default of such allegations the Court has an inherent jurisdiction to dismiss the action as an abuse of procedure.

COMPENSATION FOR LANDS EXPROPRIATED—MINERAL CONTENTS OF LAND—ONUS PROBANDI.

Brown v. *Commissioners for Railways*, 15 App. Cas., 240, was an appeal from the Supreme Court of New South Wales. The action was brought to recover compensation for lands expropriated under a statute. The Judge, after hearing conflicting evidence as to the existence of coal in paying quantities, assessed damages in respect thereof, and it was held that the verdict being one that a jury could reasonably find, it could not be set aside as against the weight of evidence, but their Lordships of the Privy Council were also of opinion that there is no rule which imposes upon the plaintiff, in such a case, the burden of proving by costly experiments the mineral contents of his land, nor that because a seam of coal is not presently workable at a profit, no compensation should be allowed for it, if it is likely to prove profitable in the future.

Notes on Exchanges and Legal Scrap Book.

NEGLIGENCE OF SOLICITORS.—"I have heard a Lord Chancellor say that of all gambling the law is the most uncertain," observed O'Brien, J., at the recent trial of *Lannon* v. *Feely*, an action against a solicitor for alleged negligence in the performance of his duty (which, being merely a jury case, resulting in a disagreement, we neither report nor comment on). This "glorious uncertainty of the law" redounds to the advantage of its practitioners, on the one hand, while rendering their existence as trained experts essential; and, on the other hand, supplies abundant reason for not holding them too strictly accountable for errors of judgment that skill and prudence such as should be ordinary on the part of a solicitor could not have precluded. "No attorney is bound to know all the law," said Chief Justice Abbott; "God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law, or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into": *Montriou* v. *Jefferys*, 2 C. & P. 113. "Against the attorney, the professional adviser, or the procurator, an action can be maintained. But," said Lord Campbell, "it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You can only expect from him that he will be honest and diligent, and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible

that you could ever have a class of men who would give a guarantee binding themselves in giving legal advice, and conducting suits at law, to be always in the right": *Purves* v. *Landall*, 12 Cl. & F. 91. As it was put by Sherwood, C.J., in a recent case before the Supreme Court of Michigan: "A lawyer is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect, and for that purpose. Neither is there any implied contract when he is employed in a case, or any matter of legal business, that he will bring to bear learning, skill, or ability beyond that of the average of his profession. Nor can more than ordinary care and diligence be required of him, without a special contract made, requiring it. Any other rule would subject his rights to be controlled by the vagaries and imaginations of witnesses and jurors, and not unfrequently by the errors committed by the courts. This the law never has done; and the fact that the best lawyers in the country find themselves mistaken as to what the law is, and are constantly differing as to the application of the law to a given state of facts, and even the ablest jurists find themselves frequently differing as to both, shows both the fallacy and danger of any other doctrine: *Babbitt* v. *Bumpus*, 28 Am. L. Reg. 529, Sect., 1889. Therefore, it is that, as says Lord Ellenborough, "an attorney is only liable for *crassa negligentia*": *Baikie* v. *Chandless*, 3 Camp. 17. But undoubtedly, as admitted by Chief Justice Tindal, "it would be extremely difficult to define the exact limit, by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded: or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa* mentioned in some of the cases, for which he is undoubtedly responsible": *Godefry* v. *Dalton*, 6 Bing. 460. Such *crassa negligentia* or *lata culpa*, however, should be taken as involving failure to use such skill as may be reasonably expected from a man's profession. As it was put in an American decision, the want of ordinary skill and care and reasonable diligence, is, in the case of an attorney, gross negligence: *Pennington* v. *Yell*, 11 Ark., 212. A solicitor is not responsible, for instance, for the consequences of a mistake in point of law upon which a reasonable doubt might be entertained: *Kemp* v. *Burt*. 4 B. & Ad. 424. Errors to which responsibility attaches should, indeed, be very gross. "They should be such," added Chief Justice Sherwood, in the case already quoted, "as to render wholly improbable a disagreement among good lawyers as to the character of the service required to be performed, and as to the manner of its performance under all the circumstances in the given case, before such responsibility attaches;" and it was said in another American case that "it is not enough that doubts may be raised of the soundness of his opinions, or correctness of his course, unless they are accompanied by the absence of all reasonable doubts of the propriety of an opposite course of opinion in the mind of every member of his profession of ordinary skill, sagacity, and prudence, caused by a decisiveness of reason and authority in its favor": *Bowman* v. *Tallman*, 27 How. Pr. (N.Y.) 274. This strong expression of the doctrine in hand is, at all events, no stronger than the reasons on which it is based would seem to justify; and it would be satisfactory to find the principle as broadly and cogently laid down by other tribunals. Chief Justice Tindall, in

Godefroy v. *Dalton (ubi supra)*, sums up the cases as establishing, in general, that a solicitor is liable for the consequences of ignorance or non-observance of the rules of practice of his court, for the want of care in the preparation of the cause for trial, or of attendance there with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice and doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law." And it may be gathered from *Foy* v. *Cooper* (2 Q.B., 937) that, whatever it is important for the client to know, it is the duty of his solicitor to report to him, and that failure in this respect is a ground for an action of negligence by the client against his solicitor.—*Irish Law Times.*

TRIAL BY JURY.—In the following letter, which appears in the *Times*, Mr. Jelf, Q.C., makes a forcible plea for the abolition of trial by jury:

"Three causes in which I have been engaged as counsel during the past week —two on circuit and one in London—have ended in the disagreement and consequent discharge of the jury. This fact, coupled with what seems to me to be the increasing frequency of such an abortive and lamentable result as this, has strengthened the conviction which has for many years been growing up in my mind that, at all events in the majority of civil causes, trial by jury is, at the present day, a mistake.

"That this conviction is shared by many of my professional brethren and of the suitors is shown by the great number of common law causes (which used all to be tried by juries), both in London and on the circuits, which are now tried, by the consent of both parties, before a judge without a jury.

"The advantages of trial by judge over trial by judge and jury seem to me to be manifold.

"In the first place, the judge must make up his mind one way or the other. He cannot say half his mind is of one opinion and the other half of the other. A definite result is obtained, and it is generally right.

"If it is wrong, it can be set right in the Court of Appeal. Thus the scandal and the grievous expense and suspense to the parties of an abortive trial through indecision is impossible.

"Secondly, the judge can, and often will, say what is passing through his mind. If he sees that the case is a very doubtful one, he can frankly say so, and recommend a compromise which may save hundreds of pounds to one of the parties, and scores of pounds to the other.

"No such collective expression or suggestion can be obtained from the jury. Except by a chance observation here and there of a single juryman, or by the uncertain and often misleading sign of look or gesture, counsel cannot tell what is passing in the minds of the majority of the jury. Nay, more, till the summing-up is over, the jury do not often know how the case is going themselves.

"Thirdly, the same muteness of the jury prevents counsel from grappling with the points which are really affecting them. The judge usually lets counsel know what is pressing on his mind, so that counsel can direct his evidence and his arguments to meet the difficulties. Not so the jury. It is almost entirely fighting in the dark, so far as they are concerned, and undetected prejudice or external influence is often at work in a manner which it is impossible to counteract.

"Fourthly, if a verdict is obtained, no one knows on what grounds it is given, and on appeal the matter is only open to conjecture. A judge, on the other hand, gives his reasons, which can be dealt with and considered in the Court of Appeal.

"Fifthly, the jury panel cannot, in practice, be strictly scrutinized, and the presence of a friend or a foe of one of the parties on the jury may, even though it be unconsciously, turn the scale.

"Sixthly, a strong judge is sometimes unduly impregnable, because he impresses the jury with his view, and yet the ultimate finding is, nominally at all events, that of the jury, whose reasons are inscrutable, and can only be set aside if twelve reasonable men could not have so found. Whereas, if he is alone, the judge must stand or fall in the Court of Appeal upon his own findings, and, as before stated, must formulate his reasons if he desires his judgment to have its proper weight.

"Seventhly, while allowing due weight to the importance of defining the issues of fact and law, and to the value of commercial views of business in some classes of cases, I think trial by jury, in the complicated problems of mixed law and fact which arise in the present day, puts an undue strain upon the ingenuity of the judge in disentangling the points on which the opinion of the jury ought to be taken. A judge with a logical mind can far better deal himself with the questions *seriatim*, eliminating at once those which are obviously open to only one proper answer, than submit them all alike to the jury, who often make contradictory findings and reduce the verdict to an absurdity.

"Eighthly, as a last, but not least, important reason, I maintain that jurymen engaged and jurymen in waiting are put to great loss and expense in attending for trials which could often be better and always more expeditiously conducted without their presence, and in which that presence is often, by consent, dispensed with after much time has been wasted.

"For these, amongst other reasons, I venture to suggest that the rights of either party to insist on a jury should be largely curtailed, and that the onus of showing that in a given case a jury is desirable should rest on the party who asks for it.

"In the past, when judges were supposed to be unduly influenced against the people, trial by jury may have been the 'palladium of our liberties,' though I believe the history of the institution is not wanting in illustrations of an opposite character.

"At the present day, however, I see no reason why, as a rule, on the common law side, a single judge should not try all sorts of civil causes involving, on the whole, probably less important issues than those which have been so long and so ably disposed of by single judges on the Chancery side."

DIARY FOR SEPTEMBER.

2. Tues..Court of Appeal Sittings begin.
3. Wed...Sir Edward Coke died, 1634, æt. 82.
4. Thur..Chancery Division High Court of Justice sits.
7. Sun....*14th Sunday after Trinity.*
8. Mon...Trinity Term Commences.
9. Tues..General Sessions and County Court Sittings for Trial in York.
12. Fri.....Frontenac, Governor of Canada, 1692.
13. Sat.....Quebec taken, and death of Wolfe, 1759.
14. Sun....*15th Sunday after Trinity.* Sir J. S. Copley (Lord Lyndhurst), Master of the Rolls, 1826.
17. Wed...First Parliament of Upper Canada met at Niagara, 1792.
18. Thur..Quebec surrendered to the British, 1759.
20. Sat.....Trinity Term ends.
21. Sun....*16th Sunday after Trinity.*
23. Tues..Courcelles, Governor of Canada, 1665.
28. Sun....*17th Sunday after Trinity.* W. H. Blake, 1st Chan. U. C., 1849.
29. Mon...St. Michael and all Angels.
30. Tues..Sir Isaac Brock, Administrator, 1811.

Reports. 5/90

IN THE FIRST DIVISION COURT OF THE COUNTY OF YORK.

WOOD *v.* JOSELYN AND SHEPPARD, GARNISHEE.

Garnishing summons—Effect of—Priority of assignment for benefit of creditors under R. S.O., c. 124, s. 9—Division Court's Act, s-s. 173, 185, and 189.

When the primary debtor, after judgment obtained against him and service of a garnishing summons on the garnishee, but before final order for payment against garnishee, makes an assignment for the benefit of his creditors, the assignee takes priority over the garnishing creditor, by virtue of the provisions of sec. 9 of R.S.O., c. 124. TORONTO, May 31, 1890.

This was an action brought by John Wood & Sons, to recover the sum of $171.40 from H. Joselin and Son and one John Sheppard, who was made a party (garnishee) to attach a debt alleged to be due by him to H. Joselin & Son, the primary debtors.

MORGAN, J.J.: On the return of the summons in this action, the primary debtors did not appear or make any defence, and I gave judgment against them in favor of the primary creditors, for the sum of $171.40 and costs of suit, and I then adjourned adjudication on the claim against the garnishee until the termination of an action in the High Court of Justice between the primary debtors and the garnishee, wherein the alleged debt garnished was in litigation between them. This action has since been determined in favor of the primary debtors, and I am now called upon to determine the right of the primary creditors to the debt or fund garnished

No evidence was given, all material facts being admitted.

The garnishee Sheppard now admits a liability between him and the primary debtors for more than sufficient to satisfy the claim and judgment of the primary creditors, and submits to pay same upon the order of this Court, but alleges that since the service on him of the garnishing summons in the action, and pending adjudication on the garnishment branch of this action, the primary debtors have made an assignment for the general benefit of their creditors, and that the fund garnished had been paid by the assignee.

The assignee also intervenes, and claims under the assignment the fund garnished, and the primary debtors, so far as they have any right to do so, support the contention of the assignee.

The assignment is under and within the statute R.S.O., chap. 124.

It is urged on the part of the primary creditors that by force of the garnishing or attaching summons, and sections 173, 185, and 189 of the R.S.O., chap. 51 (Division Courts Act), the fund or debt in the hands of the garnishee, or due by him to the primary debtors, was attached to answer the claim of the primary creditors, and thereupon became a security to the primary creditors, and that the property in the debt or fund garnished was, on the garnishee being served with the summons in the action, transferred from the primary debtors to and became vested in the primary creditors, and that, therefore, the assignment by the primary debtor for the general benefit of his creditors, executed as it was after the service of the garnishing summons, did not pass to the assignee any title to the garnisheed debt, because by section 4 of the R.S.O., chap. 124, such assignment would under the statute only pass to the assignee the estate of the assignor belonging to him at the time of the assignment.

This contention, supported as it is by a long line of cases in the English and in our own Courts, would have been unanswerable but for section 9 of chap. 124, R.S.O. This section was, in my judgment, intended by the Legislature to have the same operation as section 45 of the English Bankruptcy Act of 1883, namely, to secure to the general creditors of an assignor or insolvent *pro rata* distribution among them, under an assignment for their benefit, all the

estate of the assignor, completely discharged from and unaffected by any judgments, executions, or other processes of law not completely executed by payment to or in favor of any particular creditor who would, but for the operation of the section, be entitled to the fruits of his judgment or execution or other process of law for enforcing judgment.

Butler v. *Wearing*, L.R. 17, Q.B.D. 183, and *ex parte Pillers In re Curtoys*, L.R. 17, Q.B.D., 653, are authorities under the English Bankruptcy Act of 1869 and 1883, in support of the view that the attachment to prevail against the assignee in bankruptcy must be completed by payment. All recent legislation has been in the direction of a *pro rata* distribution amongst his creditors of the debtor's whole estate as opposed to the right of single creditors to absorb such estate, either in whole or in part, by force of judgments or executions held by them or against the debtor. The Creditors' Relief Act aims, though somewhat feebly, in that direction, and the Act under consideration was obviously intended to accomplish that result. It is true that only the term "execution" is used in sec. 9 as a method by which a judgment may be enforced, and of which an assignment is to take precedence, but the intention of the Legislature is clear, and I ought to apply the principle of the statute, though the section be inartistically drawn and is wanting in apt words.

It could never have been the intention of the Legislature to give an assignment for benefit of creditors precedence over an execution not completely executed by payment, and at the same time to permit a garnishing summons or attachment to prevail, where the primary creditor, before he could get any fruit of his attachment under such summons, would not only have to get a judgment against the primary debtor but also, if resisted by the garnishee, prove the liability of the garnishee to the primary debtor, and get judgment against the garnishee and enforce the same by execution. The same reasoning, I think, would apply if the garnishing summons or attachment was under a judgment already recovered against the primary debtor.

The question arising in this action is a new one, turning, as I have suggested, on the construction to be put on section 9 of the Ontario Statute, respecting assignments for benefit of creditors. It gives me much satisfaction to know that my judgment may be reviewed by the Court of Appeal, and if I have erred in my view of the meaning of the section, the primary creditors can obtain relief. I am, however, strongly impressed that the word "execution" in section 9 must mean all process upon a judgment by which a creditor may obtain out of a debtors assets of every kind, satisfaction of his judgment.

The garnishee must be discharged and this action dismissed as against him with costs, leaving him to pay to the assignee for benefit of creditors any amount due by him to the primary debtors.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

NOVA SCOTIA.] [June 13.

LAWRENCE *v.* ANDERSON.

Debtor and creditor—Assignment in trust—Release to debtor by—Authority to sign—Ratification—Estoppel.

L. brought an action against A. on an account stated, to which the defence set up was release by deed. On the trial it was shown that A. had executed a deed of assignment in trust for the benefit of his creditors, and under authority by telegram had signed the same in the name of L. After the execution of the deed by A. the creditor L. continued, with knowledge of the deed, to send him goods, and about a month after he wrote A. as follows: "I have done as you desired by telegraphing you to sign deed for me, and I feel confident that you will see that I am protected and not lose one cent by you. After you get matters adjusted I would like you to send me a cheque for $800." Four years after A. wrote to L. a letter, in which he said: "In one year more I will try again for myself, and hope to pay you in full." The account sued upon was stated some eighteen months after this last letter.

Held, reversing the judgment of the Court below, TASCHEREAU and PATTERSON, JJ., dissenting, that L. was not estopped from denying that he executed the deed of assignment; and as it was evident that he did not expect to participate in the benefit of the deed, but looked to the debtor A. for payment, he could recover on the account stated.

Held, per PATTERSON, J., that although A. had no sufficient authority to sign the deed for L., yet there was an agreement to compound the debt which was binding on L., and the understanding that L. was to be paid in full would be a fraud upon the other creditors of A.

Appeal allowed with costs.

Eaton, Q.C., for the appellant.

Newcombe for the respondent.

NOVA SCOTIA.] [June 12.

O'BRIEN *v.* COGSWELL.

Assessments and taxes—Lien—Priority of mortgage made by Statute—Construction of Act—Healing clause—Effect and application of.

The Halifax City Assessment Act, 1888, made the taxes assessed on real estate in said city a first lien thereon, except as against the Crown.

Held, affirming the judgment of the Court below (21 N. S. Rep. 155, 279), that such lien attached to a lot assessed under the Act, in preference to a mortgage made before the Act was passed.

The Act provided that in case of non-payment of taxes assessed upon any lands thereunder, the city collector should submit to the Mayor a statement in duplicate of lands liable to be sold for such non-payment, to which statements the Mayor should affix his signature and the seal of the Corporation; one of such statements should then be filed with the city clerk and the other returned to the collector with a warrant annexed thereto, and in any suit or other proceeding relating to the assessment on the real estate therein mentioned, any statements or lists so signed and sealed should be received as conclusive evidence of the legality of the assessment, etc. In a suit to foreclose a mortgage on land which had been sold for taxes under this Act, the legality of the assessment and sale was attacked.

Held, per STRONG, TASCHEREAU, and GWYNNE, JJ., that to make this provision operative to cure a defect in the assessment caused by failure to give a notice required by a previous section, it was necessary for the defendants to show affirmatively that the statements had been signed and sealed in duplicate and filed as required by the Act; and the production and proof of one of such statements was not sufficient.

Per RITCHIE, C.J., and PATTERSON, J., that it was sufficient to produce the statement returned to the collector signed and sealed as required, and with the necessary warrant annexed, and in the absence of evidence to the contrary, it must be assumed that all the proceedings were regular, and that the provision of the statute had been complied with.

The Act also provided that the deed to a purchaser of lands sold for taxes should be conclusive evidence that all the provisions with reference to the sale had been complied with.

Held, per STRONG, TASCHEREAU, and GWYNNE, JJ., that this provision could only operate to make the deed available to cure defects in the proceedings connected with the sale, and would not cover the failure to give notice of assessment required before payment of the taxes could be enforced.

Held, per RITCHIE, C.J., and PATTERSON, J., that the deed could not be invoked in the present case to cure any defects in the proceedings, as it was not delivered to the purchaser until after the suit commenced; therefore, a failure to give notice that the land was liable to be sold for taxes, which notice was required by the Act, rendered the sale void.

Appeal dismissed with costs.

Sedgewick, Q.C., and *Lyons*, for appellant.

Lash, Q.C., and *McDonald*, for respondents.

NEW BRUNSWICK.] [June 13.

PROVIDENCE WASHINGTON INSURANCE CO. *v.* GEROW.

Marine Insurance—Construction of policy—Port on west coast of South America—Guano Islands—Commercial usage.

A vessel was insured for a voyage from Melbourne to Valparaiso for orders, thence to a loading port on the western coast of South America, thence to United Kingdom. She went to Valparaiso, and from there proceeded to Lobos, an island from twenty-five to forty miles off the west coast of South America, where she loaded guano and sailed for England. Having met with heavy weather she returned to Valparaiso, and a survey was held by which it appears that to repair her would cost more than she would be worth afterwards. The owner claimed payment under the policy for a constructive total loss, which was resisted on the ground of deviation in the vessel loading at a port off the coast.

On the trial of an action on the policy, evidence was given by shipowners and mariners to the effect that, by the usage of the shipping trade, a loading port on the west coast of South America, as specified in the policy, would include the Guano Islands lying off the coast. The jury found for the plaintiff.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the policy must be construed to mean what would be understood by shippers, shipowners, and underwriters, and the jury having based their verdict on evidence of what such understanding would be, their finding could not be disturbed.

Appeal dismissed with costs.

Stratton for the appellants.

Weldon, Q.C., for the respondent.

NOVA SCOTIA.] [June 13.

CLARK *v.* CLARK.

Will—Construction of—Devise to two persons—Joint tenants or tenants in common—Severance.

The will of R. C. devised his real estate to his two sons, their heirs, executors, and assigns, and ordered that said sons should jointly and in equal shares pay the testator's debts, and the legacies granted by the will. There were six legacies given to two other sons of the testator of £50 each, payable by the devisees in two, three, four, five, six, and seven years respectively. The estate was vested in the devisees before the passing of the Act abolishing joint tenancies in Nova Scotia.

Held, reversing the decision of the Court below (21 N.S., Rep. 378), TASCHEREAU and GWYNNE, JJ., dissenting, that the provisions for payment of debts and legacies indicated an intention on the part of the testator to effect a severance of the devise, and the devisees took as tenants in common and not as joint tenants.

Fisher v. *Anderson* (4 Can. S.C.R., 406), followed.

On the trial of a suit, between persons claiming through the respective devisees, to partition the real estate so devised, evidence of a conversation between the original devisees as to the manner in which they regarded their tenure of the estate, was tendered and rejected.

Held, GWYNNE, J., dissenting, that such evidence was properly rejected.

Held, per GWYNNE, J., that the evidence could not have had the effect of assisting to explain the will, which was the ground upon which it was rejected at the trial, but it should have been received as evidence of a severance between the devisees themselves, joint tenants under the will. Appeal allowed with costs.

Harrington, Q.C., for the appellants.

Borden for the respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

From Q.B.D.] [Jan. 8.

HENDERSON *v.* KILLEY ET AL.

Partnership—Dissolution—New firm—Novation—Trust—Right of third person to enforce.

K. and M. carried on business under the name of K. & Co., and dissolved partnership, K. giving to M. sixteen promisory notes for $500 each, with interest, for M.'s share in the business, which was continued by K. K. afterwards formed a partnership with O., and by the articles of partnership transferred to the co-partnership, as his contribution to the capital, all the assets of his business subject to the deduction therefrom of his liabilities, which was to be assumed by the co-partnership and charged against him. Amongst K.'s liabilities known to O., were ten of the notes which M. had endorsed over to the plaintiff before maturity, and the assets transferred to the co-partnership were sufficient to pay all K.'s liabilities including these notes. The firm of K. and O. paid two of the notes and also paid interest on another note, and some negotiations took place between the plaintiff and the firm of K. & O. for an extension of time for payment of the unpaid notes.

Held (BURTON, J.A., dissenting), reversing on this point the judgment of the Queen's Bench Division, 14 O.R., 137, that no trust was established in favor of M., by the co-partnership agreement between K. and O., and that the plaintiff, assignee of M., was not entitled to enforce, as against O., the performance of the stipulation in the deed for payment of the notes held by her.

Gregory v. *Williams*, 3 Mer. 582, and *In re Empress Engineering Co.*, 16 Chy.D., 125, specially considered.

But (*per* HAGARTY, C.J.O.), that the evidence established that an independent agreement

had been entered into between the firm of K. & O., and the plaintiff to pay the notes in question.

The Court being thus divided in opinion, the appeal was dismissed with costs.

Robinson, Q.C., and *Mackelcan*, Q.C., for the appellants.

Osler, Q.C., and *Teetzel*, for the respondent.

From Q.B.D.] [May 13.

REGINA v. COUNTY OF WELLINGTON.

Constitutional Law—British North America Act—Bankruptcy and insolvency—Banking, and incorporation of banks—Property and civil rights—Crown—Taxation—Tax Sale—R.S.O. (1887), c. 193, s. 7, s-s. 1.

Certain lands, after the grant from the Crown, became, by certain mesne conveyances, the property of the Bank of Upper Canada, and, upon the failure of the bank, were conveyed to its trustees, and were subsequently, with the other assets of the bank, vested in the Crown, by 33 Vict., c. 40 (D.). The Crown then sold them, and the purchaser gave a mortgage back to secure part of the purchase money. The mortgage contained the usual provisions for payment of taxes, but the taxes were not paid, and the lands were sold, this action being brought to set aside the sale.

Held, per HAGARTY, C.J.O., and OSLER, J.A., that the Act, 33 Vict., c. 40 (D.), was *intra vires*, being properly to be regarded as one dealing with "bankruptcy and insolvency," or "banking, and incorporation of banks." That the lands were therefore properly vested in the Crown, as trustee, and that the interest of the Crown, as mortgagee and trustee, could not be sold for arrears of taxes, but was exempt under R.S.O. (1887), c. 193, s. 7, s-s. 1.

Per BURTON, J.A.: That the Act was *ultra vires* as an interference with "property and civil rights in the Province," and that the lands remained in the trustees subject to taxation. That even if the Act was *intra vires*, still the lands, being vested in the Crown in the place and stead of the trustees, voluntarily selected by the shareholders of the bank, were not exempt from taxation.

Per MACLENNAN, J.A.: That the Act was *ultra vires* and the lands subject to taxation, but that upon the evidence, the sale was fraudulent and void as far as the interest of the Crown was concerned.

The judgment of the Queen's Bench Division was therefore affirmed, BURTON, J.A., dissenting.

Bain, Q.C., and *Kappele*, for the appellants.

H. D. Gamble and *H. L. Dunn* for the respondent.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

FROM CO. CT. HASTINGS.] [June 6.

ASHLEY *v.* BROWN.

Assignments and preferences—Creditor—Knowledge of insolvency—R.S.O. (1887), c. 124.

One who has a right of action for tort, and subsequently recovers judgment, is not a creditor within the meaning of the Assignments and Preferences Act, so as to be in a position to attack a transaction entered into by the tort feasor before the action was commenced.

Where a transaction is attacked under that Act, knowledge by the transferee of the insolvency of the transferor must be shown.

Johnson v. *Hope*, 17 A.R., 10, adhered to.

Judgment of the County Court of Hastings affirmed.

Moss, Q.C., and *Clute*, Q.C., for the appellant.

Watson, Q.C., and *Redick*, for the respondent.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

DIV'L CT.] [June 27.

IN RE LONG POINT CO. *v.* ANDERSON.

Game—Feræ naturæ—Property of owner of land in deer found thereon—29 & 30 Vict., c. 122—R.S.O., c. 221, s. 10, Construction of—Prohibition — Division Court — Undisputed facts—Error in law—Misconstruction of statutes.

The defendant killed upon his own land, which adjoined that of the plaintiffs', and was unfenced, a deer, one of the progeny of certain deer imported by the plaintiffs, and allowed to run at large upon their land.

Held, that the deer was *ferae naturae* and, having been shot by the defendant on his own land, belonged to him.

Held, also, that neither the Act incorporating the plaintiffs, 29 & 30, Vict., c. 122, nor R.S.O.,

c. 221, s. 10, vested the absolute property in the deer in the plaintiffs.

Prohibition was granted to a Division Court where there were no facts in dispute, and the Judge in the inferior Court applied a wrong rule of law to the facts, and grounded his judgment upon a misconstruction of the facts above referred to.

W. M. Douglas for plaintiffs.

C. E. Barker for defendant.

Div'l Ct.] [June 27.

PECK *v.* AGRICULTURAL INS. CO.

Insurance—Fire—Unoccupied building—Special condition—Reasonableness—Information given to agent of Insurance Co., but not in application—Powers of agent—Evidence—Rejection of.

The defendants issued a policy of insurance against fire, dated 23rd April, 1889, upon a house of the plaintiff.

The application signed by the plaintiff stated that the house was occupied as a residence by the plaintiff's son. A fire took place on the 14th November, 1889, at which date, and for six months previously, the house had been unoccupied. One of the special conditions indorsed upon the policy was that if a building became vacant or unoccupied, and so remained for ten days, the entire policy should be void. The plaintiff and his wife swore that when the agent came to him and drew the application he asked the plaintiff if there was anyone in the house at the time, and the plaintiff told him that his son was living there at the time, but was going to leave in about two weeks, and asked if that would make any difference, and was informed by the agent that it would not. By a clause in the application the plaintiff agreed that no statement made or information given by him prior to issuing the policy to any agent of the defendants should be deemed to be made to or binding upon the defendants unless reduced to writing and incorporated in the application; and on the margin of the application there was a notice showing that the powers of agents were limited to receiving proposals, collecting premiums, and giving the consent of the defendants to assignments of policies.

Held, that the special condition referred to was not an unreasonable one, and that the agent had no power to vary it; and an action to recover the amount of the loss was dismissed.

The plaintiff at the trial sought to give evidence of certain transactions between the agent of the defendants and a brother of the plaintiff for the purpose of showing that the plaintiff, having become aware of them before the application was made by him, was justified in believing that the defendants did not regard the condition as to occupation as a material one.

Held, that this evidence was properly rejected.

Clute, Q.C., for plaintiff.

J. W. Kerr for defendants.

Practice.

C. P. Div'l Ct.] [June 27.

MCLEAN *v.* BRUCE.

Receiver—Residuary estate under will—Cross-examination of executor and residuary legatee—Account of debts and legacies unpaid.

In answer to the defendant's application for a receiver to receive the interest of the plaintiff as residuary legatee under a will, of which he was also the surviving executor, the plaintiff filed an affidavit in which he stated that the estate was insufficient to pay the debts and specific legacies, and that there would be no sum coming to the plaintiff as residuary legatee.

Held, that the plaintiff upon cross-examination upon his affidavit must swear as to whether there were any and what debts and legacies unpaid.

H. Cassels for plaintiff.

Hoyles, Q.C., for defendant.

C.P. Div'l Ct.] [June 27.

MACLEAN *v.* THE BARBER & ELLIS CO.

Discovery—Inspection of document before delivery of statement of claim—Merits.

In an action to recover an amount alleged to be due by the defendants upon an advertising contract after crediting an amount admitted to be due by the plaintiff to the defendants for rent, and also to recover damages for illegal distress for rent, it appeared that the defendants had agreed to pay a certain sum to the plaintiff for advertising, and had also written a letter to the plaintiff agreeing that a certain part of the rent should be taken out in advertising. This letter purported to be in answer to a letter

written by the plaintiff making a proposal which the defendants agreed to.

Held, that the plaintiff was entitled to have his own letter produced by the defendants for his inspection before delivery of his statement of claim, in order to enable him to frame it properly.

Hooey v. *Gilbert*, 12 P.R., 114, distinguished.

It is not necessary that an application by a plaintiff for inspection should be supported by a specific statement of merits, if from the material before the Court it can be determined whether the claim is or is not based upon merits.

T. S. Jarvis for the plaintiff.

Kilmer for defendants.

Q. B. Div'l Ct.] [June 27.

FULTON *v.* VIPOND.

Costs—Depriving successful party of—"Good cause"—Rule 1170—Reversing decision of trial Judge—Application of trial.

The Court can interfere with the trial Judge's discretion in depriving a successful party of costs in an action tried by a jury, where he has given effect to considerations which do not constitute "good cause" within the meaning of Rule 1170.

The plaintiff's principal claim, upon which he succeeded, was for wood cut and removed by the defendant. The trial judge ruled that the conduct of the plaintiff caused unnecessary litigation, and he deprived him of the costs of that claim. The plaintiff and defendant had each had a measurement made, and differed as to the result. The plaintiff refused to have a re-measurement, and brought the action, the result of which showed that his measuremeut was correct.

Held, that the plaintiff's refusal was not misconduct inducing the litigation, and there was no "good cause" for depriving him of costs.

Huxley v. *West London Extension R. W. Co.*, 14 App. Cas., at pp. 33-4, specially referred to.

Rule 1170 provides that where an action is tried by a jury the costs shall follow the event, unless upon application made at the trial for good cause shown, the Judge otherwise orders.

Semble, that there must be substantially an application at the trial, and if the trial Judge anticipating the application of counsel makes the order in presence of opposing counsel, he makes it on application.

D. W. Saunders for the plaintiff.

Hoyles, Q.C., for the defendant.

Appointments to Office.

PROVINCE OF ONTARIO.

The Honorable Sir Thomas Galt, Knight, Chief Justice of the Common Pleas, Ontario, to be the Administrator of the Government of the Province of Ontario during the absence on leave of the Honorable Sir Alexander Campbell, K.C.M.G., the Lieut.-Governor of the said Province of Ontario.

LOCAL JUDGE OF THE HIGH COURT OF JUSTICE.

District of Thunder Bay.

Frederick William Johnston, of Goderich, Junior Judge of the District Court of Thunder Bay, to be Local Judge of the High Court of Justice for Ontario.

COUNTY COURT JUDGES.

Grey.

Duncan Morrison, of Owen Sound, Barrister, to be Deputy Judge of the County Court of the County of Grey.

Oxford.

Henry Birkett Beard, of Woodstock, one of Her Majesty's Counsel, to be Deputy Judge of the County Court of the County of Oxford, for the period of four months, from 1st July, 1890.

Nova Scotia.

John P. Chipman, of Kentville, one of Her Majesty's Counsel, to be Judge of the County Court of the several counties comprised in district number four, in the Province of Nova Scotia.

SHERIFF.

District of Thunder Bay.

Alexander William Thompson, of Port Arthur, to be Sheriff in and for the District of Thunder Bay, *vice* John Fitzgerald Clarke, deceased.

LOCAL REGISTRAR.

District of Thunder Bay.

James Meek, of Port Arthur, to be Local Registrar of the High Court of Justice for Ontario, Clerk of the District Court, and Registrar of the Surrogate Court, in and for the District of Thunder Bay, *vice* Charles Kreissman, resigned.

COUNTY COURT CLERKS.

Honorable Alexander McLagan Ross, of Goderich, to be Clerk of the County Court of the County of York, *vice* Walter McKenzie, deceased.

POLICE MAGISTRATE.

Leeds.

Reid Burritt Alguire, of Athens, to be Police Magistrate for the Village of Athens, in the County of Leeds, without salary.

REGISTRAR OF DEEDS.

Durham.

James Wellington McLaughlin, of Bowmanville, M.D., to be Registrar of Deeds in and for the West Riding of the County of Durham, *vice* Robert Armour, deceased.

DIVISION COURT CLERK.

Ontario.

Joseph Edwin Gould, of Bolton, to be Clerk of the Fourth Division Court of the County of Ontario, *vice* Z. Hemphill, resigned.

Peel.

David Pearcy, of Bolton, to be Clerk of the Fourth Division Court of the County of Peel, *vice* Samuel Jefferson, resigned.

ASSOCIATE CORONERS.

Brant.

Archibald J. Sinclair, of Paris, M.D., to be an Associate Coroner within and for the County of Brant.

Carleton.

Oliver Cromwell Edwards, of Ottawa, M.D., to be an Associate Coroner within and for the County of Carleton.

District of Nipissing.

Robert Baxter Struthers, of Sudbury, M.D., to be an Associate Coroner within and for the District of Nipissing.

Oxford.

John Mearns, of Woodstock, M.D., to be an Associate Coroner within and for the County of Oxford.

York.

Carson Henry Britton, of East Toronto, M.D., to be an Associate Coroner within and for the said County of York.

DIVISION COURT BAILIFFS.

Algoma.

Jacob Stevenson, of Thessalon, to be Bailiff of the Third Division Court of the District of Algoma, *vice* W. J. Miller, resigned.

Halton.

Robert Lucas, of Oakville, to be Bailiff of the Second Division Court of the County of Halton, *vice* John Weir, resigned.

District of Thunder Bay.

John Woodside, of Port Arthur, to be Bailiff of the First Division Court of the District of Thunder Bay, *vice* Edward Donovan, resigned.

COMMISSIONERS FOR TAKING AFFIDAVITS FOR USE IN ONTARIO.

England.

Sydney Hampden Peddar, of London, England, Solicitor, to be a Commissioner for taking Affidavits within and for the County of London, and not elsewhere, for use in the Courts of Ontario.

United States.

Harris Buchanan, of Pittsburgh, in the State of Pennsylvania, to be a Commissioner for taking Affidavits within and for the Territory within which the Circuit Court of the United States for the Western District of Pennsylvania has jurisdiction, and not elsewhere, for use in the Courts of Ontario.

OSGOODE HALL LIBRARY.

(COMPILED FOR THE CANADA LAW JOURNAL.)

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Griffiith (W.), The Indian Evidence Acts, London, 1890.

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Law Society of Upper Canada.

LAW SCHOOL—HILARY TERM, 1890.

LEGAL EDUCATION COMMITTEE.

CHARLES MOSS, Q.C., *Chairman.*

C. ROBINSON, Q.C. Z. A. LASH, Q.C.
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F. MACKELCAN, Q.C. J. H. FERGUSON, Q.C.
W. R. MEREDITH, Q.C. N. KINGSMILL, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers: E. D. ARMOUR, Q.C.; A. H. MARSH, B.A. LL.B. Q.C.; R. E. KINGSFORD, M.A. LL.B.; P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the

first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum:

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p. m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or

Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

LITTELL'S LIVING AGE—The numbers of *The Living Age* for August 23rd and 30th contain The Origin of Alphabets, *Edinburgh;* Western China: Its Products and Trade, *Quarterly;* The Shetland Isles in the Bird's-nesting Season, *Contemporary;* A Voice from a Harem, *Nineteenth Century;* The Cession of Heligoland, *Scottish;* Comedy in Fiction, "In Sickness and in Health," and The Bamboo, *Blackwood;* Christmas-tide at Tangier, and Watteau: His Life and Work, *Temple Bar;* Chapters from some Unwritten Memoirs, *Macmillan;* Rural Reminiscences, and the Sea and Seaside, *Cornhill;* A Manual for Interior Souls, and The "Smart" Way of Shaking Hands, *Spectator;* Tarantulas, *Saturday Review;* The Oxford Summer Meeting, *Speaker;* Hyacinth Culture in Holland, *Chambers';* with instalments of "Marcia," and "An Attractive Young Person," and poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

The Canada Law Journal.

VOL. XXVI. OCTOBER 1, 1890. No. 15.

IT will by this time be known to our readers that the vacancy in the Chancery Division has been filled by the appointment of Mr. Richard M. Meredith, of London. Rumor had given no sound as to who might be a likely recipient of the honor, and the appointment of one but little known outside of his own circuit caused some surprise in legal circles—a surprise which was not lessened by the fact that the Crown had selected a man from the outer bar. This, of course, is not without precedent. But it does appear to be somewhat of an unkind cut to the shoals of gentlemen now wearing silk, that they should all have been passed by and that one of the comparatively few left to the outer bar should have been selected. Possibly none of the newly appointed Q.C.s. would accept a seat on the Bench! The fact is, men in the front rank of the profession cannot be induced to give up their practice for a seat on the Bench. This is a great evil and one which we are surprised the Government takes no means to remedy. There are difficulties doubtless in the way; the French-Canadian question cropping up here, as it does in other ways, where Ontario is concerned. The question, however, must be faced sooner or later, and the sooner the better. We have already in the High Court of Justice a representative of the western metropolis who does it credit, and has proved a most useful and excellent judge. We trust that the gentleman who is now congratulated upon his promotion may be as great a success.

AMONG the judicial deliverances which will hereafter serve as landmarks of the development of constitutional government will be found, we believe, the learned and able judgment of the Chancellor of Ontario, on the case recently submitted to the Chancery Divisional Court, regarding the constitutionality of the Act of the Provincial Legislature (51 Vict., c. 5), vesting in the Lieutenant-Governor the power of pardoning offences against statutes within the competence of the Local Legislature. The learned Chancellor places the prerogative of pardon on this basis, that it is not a mere personal right vested in the sovereign, to be exercised capriciously, but is a necessary constituent element and supplement of the law-making power, wherever that power may be vested by the constitution. From these premises he draws the conclusion, that where the power to make a law is vested, there also resides the power to pardon for breaches of that law, a power to be exercised constitutionally and subject to the advice of ministers responsible to the people. The result therefore is arrived at, that so far as the B.N.A. Act has vested in the Provincial Legislature power to make laws, so far it has also

ex necessitate vested in it the power to pardon for breaches of those laws; and, having that power, it is also competent for it to delegate its exercise to its chief executive officer. In connection with this subject, which is one of great general interest, we publish a letter from a correspondent who takes exception to the conclusion arrived at by the learned Chancellor. He is a courageous man who measures swords with that eminent jurist, and it would be a matter of surprise to us if the latter should prove to be wrong. However, let "Lex" speak for himself.

THE Law Society has been recently launching out in the way of expenditure. A handsome new carpet now graces the floor of the library at Osgoode Hall, which, moreover, is about to be lit with all the brilliancy of electric lights. We do not complain of such expenditure, if the Society can afford it. We were, however, under the impression when the Law Society decided to dock off its annual contribution to the Osgoode Hall Tennis Club of $6, for the water-rates for watering the lawn, that it was in an impoverished condition; otherwise, it is difficult to understand the necessity for such rigid economy. We venture to think instead of cutting off this insignificant allowance, it would have exercised a very legitimate and proper discretion if it had very considerably increased its assistance to the Club, which is now, we hear, in a somewhat languishing condition for want of funds. The Canadian Bank of Commerce, during the past season has provided, at its own expense, a tennis ground and the paraphernalia of the game, for its employees. Such liberality—but we are forgetting—"comparisons are odious."

THERE can be no doubt that it is in the best interest of the community that the legal profession should, as a rule, be well versed in the laws, which they have to assist in administering. One important branch of law is that embodied in the statutes, and it must be confessed that year by year it becomes a more difficult one to master. No less than three legislatures are empowered to make laws for us, viz., the Imperial Parliament, the Dominion Parliament, and the Provincial Legislature. The former, of course, now intervenes, as far as we are concerned, only in exceptional cases; but in those exceptional cases it has sometimes a concurrent, and sometimes an exclusive, jurisdiction. Not only has the student who would learn the statute law to keep track of the legislation of these three bodies, but he has also in the case of Imperial Statutes to sift out of a vast mass of ancient legislation, the various statutes which have been introduced as part of the law of this Province, not by specific enumeration, but by use of the most general words. No attempt has ever been made, we believe, to collect and publish the various English statutes which are in force here. It is a work of great magnitude, and one which requires for its successful issue not merely the industry and learning of a private individual, but also, in order to give authority to the conclusions arrived at, it demands the sanction of the legislative body. The work is, for this reason, almost beyond the competence of mere private effort, and is one that should be taken in hand under the authority of the Legislature.

Fortunately the labor attending any such step is materially lightened by the labors of the revisers of the Imperial statutes; but it must be remembered that this revision has no legal effect in Ontario, and that, so far as this Province is concerned, it may be found that not a few ancient English statutes which have been repealed upon the recommendation of the Imperial Commissioners for the revision of the Statutes, are still in force in Ontario. The labor of learning the Statute Law, so far as the Dominion and Provincial statutes are concerned, is materially facilitated by a periodical revision of the statutes, and what is now needed is the publication of a volume containing the Imperial statutes which are in force in Ontario. We commend this subject to the serious consideration of the Ontario Government, and believe that its accomplishment will prove a boon, particularly to the legal profession, and indirectly to the public at large. It is a step which it appears to us has been already too long delayed.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for August comprise 25 Q.B.D., pp. 193-328; 15 P.D., pp. 133-148; 44 Chy.D., pp. 329-502; and 15 App. Cas., pp. 249-309.

NEGLIGENCE—MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT, 1880 (43 & 44 VICT., C. 42), S. 1, S-S. 3 (R.S.O., C. 141, S. 3, S-S. 4).

In *Snowden* v. *Baynes*, 25 Q.B.D., 193, the Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.) unanimously affirmed the decision of the Divisional Court, 24 Q.B.D., 568, noted *ante* p. 296, on the ground that Sellick, under whose directions the plaintiff had acted, had no authority from the defendant to give directions to the plaintiff, and consequently there was no evidence of any order being given by any one to the plaintiff which he was bound to obey, within the meaning of s. 1, s-s. 3 (R.S.O., c. 141, s. 3, s-s. 4).

PRACTICE—PRODUCTION OF DOCUMENTS BY PERSONS NOT PARTIES—ORD. XXXVII. R. 7—(ONT. RULE 580).

In *Elder* v. *Carter*, 25 Q.B.D., 194, the Court of Appeal (Lindley and Bowen, L.JJ.) were of opinion that under Ord. xxxvii., r. 7 (see Ont. Rule 580), the Court could not properly order a person not a party to the proceedings, to produce documents, merely for the purpose of discovery, but only for the purpose of a pending trial, hearing, or application, or in order to carry out or complete an order which has already been obtained. In other words, unless the party is entitled to the production of such document at the moment the order is made, it ought not to be granted. Lindley, L.J., was of opinion that if the rule purported to give the right of discovery as against strangers to the action, it would be *ultra vires*.

CRIMINAL LAW—EVIDENCE OF GIRL, NOT GIVEN UPON OATH—INDECENT ASSAULT.—48 & 49. VICT., C. 69—(53 VICT., C. 37, S. 13, D.).

The *Queen* v. *Paul*, 25 Q.B.D., 202, may be usefully referred to as throwing light on the law of evidence in criminal cases. By an English statute (48 & 49 Vict., c. 69; (and see now a similar provision in the recent statute, 53, Vict., c. 37, s. 13, D.) it is provided that upon a trial of a charge of unlawfully and carnally knowing or attempting to have unlawful carnal knowledge of any girl under thirteen, the evidence of the girl, if she be of too tender years to understand the nature of an oath, may be received without oath. The prisoner was charged with an attempt to have carnal knowledge of a girl under thirteen, and also with an indecent assault. The evidence of the girl was taken without oath, and the jury acquitted the prisoner of the first charge, and on the second charge it was contended that the evidence not under oath was not admissible, but the Judge submitted it to the jury, and the prisoner was convicted of the assault. This the Court for Crown cases reserved (Lord Coleridge, C.J., Hawkins, Mathew, Day, and Grantham, JJ.), held was erroneous, and they quashed the conviction; and, notwithstanding a passage in Hale's Pleas of the Crown, vol. 1, p. 634, to the contrary, Hawkins, J., lays it down that whatever may have been done in particular cases before the Act in question, no testimony whatever could in a criminal trial be received except upon oath, and that the Act made the unsworn evidence admissible only on the two specific charges, and it was left as it was before the Act, as regards the charge of indecent assault, and therefore as to that it was inadmissible, and could not be considered by the jury.

PRACTICE—OFFICIAL REFEREE—APPEAL—POWER OF COURT TO ENTER JUDGMENT—ORD. XXVI., R. 52, ORD. XL., R. 10—(ONT. RULES 37, 755).

Clark v. *Sonnenschein*, 25 Q.B.D., 226, may be referred to for the purpose of pointing out a difference which exists between the English rule, Ord. xxvi., r. 52, and Ont. Rule 37. Under the former a referee, to whom a cause is referred, has power to order judgment to be entered, but under the Ont. Rule 37, this part of the English rule is omitted. In the present case it was held that on an appeal from an official referee, who has ordered judgment to be entered for the plaintiff, a Divisional Court has power, not only to set aside the judgment, but also, under Ord. xl., r. 10, to enter judgment for the defendant. Ont. Rule 755.

PRACTICE—APPEAL—JURISDICTION—"CRIMINAL CAUSE OR MATTER"—STRIKING SOLICITOR OFF THE ROLLS.

In re Eede, 24 Q.B.D., 228, the Court of Appeal (Lord Esher, M.R., and Lindley, L.J.) hold that an order striking a solicitor off the rolls, for having permitted his name to be used by an unqualified person, is not a criminal cause or matter, and is therefore appealable to the Court of Appeal.

PRACTICE—TIME—NOTICE OF MOTION—"APPLICATION."

In re Gallop & C.Q.M. Export Co., 25 Q.B.D., 230, is a case upon the construction of the rule regulating the time for moving against an award, in which Den-

man and Charles, JJ., held that if notice of motion be served within the time limited by the Rule, the application is made in time, although the motion may not be actually put in the paper or brought on to be heard until the time mentioned in the Rule had expired; see *Re Sweetman* v. *Gosfield*, *ante* p. 380.

PRACTICE—DISCOVERY—PENAL ACTION—ACTION FOR FRAUDULENT REMOVAL OF GOODS.

In *Hobbs* v. *Hudson*, 25 Q.B.D., 232, the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.) decided that an action for double value under II. Geo., 2, c. 19, s. 3, for the fraudulent removal of goods by a tenant, is a penal action, and one, therefore, in which the plaintiff is not entitled to examine the defendant for discovery.

PRACTICE—WRIT ISSUED BEFORE JUDICATURE ACT—RENEWAL WITHOUT LEAVE—ORD. VIII., R. 1. (ONT. RULE 238).

In *Hume* v. *Somerton*, 25 Q.B.D., 239, the writ of summons had been issued before the Judicature Act, and had been kept renewed in the manner prescribed by the Common Law Procedure Act, until 1890, when it was served, no leave of the Court or a Judge to renew having been obtained under Ord. viii., r. 1, (Ont. Rule 238). The defendant applied to set aside the writ. The Divisional Court (Denman and Charles, JJ.) were of opinion that the provisions of the Common Law Procedure Act, regarding the renewal of writs, had been suspended by the Judicature Rules, and therefore that the writ had not been duly renewed, and it was set aside.

PROHIBITION—INFERIOR COURT—WANT OF JURISDICTION—WAIVER OF OBJECTION.

Moore v. *Gamgee*, 25 Q.B.D., 244, was an application for a prohibition to a County Court, on the ground that the action had been commenced against the defendant in a county in which he did not reside. The Court would have had jurisdiction to entertain the action if leave had been obtained to sue in that Court. The leave had not been obtained, but the defendant appeared, and the case was partly heard, and then adjourned to a future day. At the second hearing, the defendant, for the first time, raised the objection to the jurisdiction of the Court. Under these circumstances the Divisional Court (Cave and A. L. Smith, JJ.) decided that the objection had been waived, and the prohibition was refused. Cave, J., points out the difference between the case where in no circumstances would the inferior court have jurisdiction, and the case where it has a jurisdiction contingent upon some proceeding being taken; in the former case the defendants taking a step does not waive his right to object to the jurisdiction, whereas in the latter case it does.

JURISDICTION—COMPLAINT OF JUSTICES—SUMMONS ISSUED BY JUSTICE WHO HAS NOT HEARD COMPLAINT—INVALIDITY OF PROCESS—APPEARANCE UNDER PROTEST.

Dixon v. *Wells*, 25 Q.B.D., 249, was a case stated by a magistrate for the opinion of the Court. The respondent had preferred a complaint against the

appellant for selling adulterated goods, before two justices, who, having considered the complaint, granted a summons, but did not sign it; the respondent then procured another justice, who had not heard the complaint, to sign and issue the summons. The appellant appeared and objected to its validity, but the magistrate before whom it was returnable overruled the objection, and tried and convicted the appellant. Lord Coleridge, C.J., and Mathew, J., quashed the conviction on the ground that the summons was no summons at all, and that although in some cases the accused might be held to waive any objection to the validity of a summons by appearing on it, yet in the present case as the time limited by statute for commencing the prosecution had then expired, the appearance could not have that effect.

MISCHIEVOUS ANIMAL—ANIMAL FERÆ NATURÆ—LIABILITY OF OWNER—SCIENTER.

In *Filburn* v. *The People's Palace Co.*, 25 Q.B.D., 258, the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) came to the conclusion that an elephant must be classed with lions and tigers and other ferocious animals; and that he who keeps one does so at his peril, and is liable for any damage done by it, though ignorant of its having any dangerous disposition.

BILL OF SALE—DESCRIPTION OF CHATTELS.

In *Hickley* v. *Greenwood*, 25 Q.B.D., 277, the sufficiency of a description of chattels in a bill of sale was in dispute; the chattels were described as "Roan horse, 'Drummer,' brown mare and foal; three rade carts." "Rades," we learn from Holliwell's Dictionary of Archaic and Provincial Words, cited by the reporter in a note, are, "the rails of a waggon." The Court (Cave and A. L. Smith, JJ.) held that in the absence of evidence showing that the description was not specific, it was sufficient.

FOREIGN JUDGMENT, ACTION ON—DEFENCE ALLEGING FRAUD—RE-TRIAL OF CASE ON ITS MERITS.

In *Vadala* v. *Lawes*, 25 Q.B.D., 310, the principle established by *Abonloff* v. *Openheimer*, 10, Q.B.D., 295, was reaffirmed by the Court of Appeal (Lindley and Bowen, L.JJ.), viz., that where an action is brought upon a foreign judgment, the defence may be raised that the judgment was obtained by the fraud of the plaintiff, even though the fraud alleged is such that it cannot be proved without re-trying the questions adjudicated upon by the foreign Court. The fraud alleged in this case was the action that the judgment was recovered in respect of certain bills of exchange which he alleged before the foreign Court to be commercial bills, whereas they were in fact given for gambling transactions.

SALVAGE—INEQUITABLE AGREEMENT.

Turning to the cases in the Probate Division, *The Mark Lane*, 15 P.D., 135, deserves a brief notice. The action was for salvage. The plaintiffs were the owners of a steamer, which fell in with another steamer on the Atlantic in distress. The master of the plaintiff's vessel agreed to tow the distressed vessel to Halifax for £5,000 if successful, or for a sum for the work done if not successful.

The £5,000 was more than a fifth of the value of the salved vessel, her cargo, and freight—but the master agreed to the terms, believing that his vessel would be abandoned if he did not. The vessel was towed into Halifax, a distance of 350 miles. The present action was to recover the £5,000 stipulated for, but the Court thought that the agreement was made under compulsion, and was therefore not enforceable, as the sum was exorbitant, and treating the agreement as inoperative, awarded the salvors £3,000 and costs.

SALVAGE—ACTION IN PERSONAM.

In *Five Steel Barges*, 15 P.D., 142, the President decided that an action for salvage will lie *in personam* against the owner of the salved vessel, though it may have been delivered up to third persons by the salvor, and the lien thereon lost.

PROBATE—TWO WILLS.

In re Callaway, 15 P.D., 147, a testator having estates in England and Africa, made two wills, each purporting to be independent of the other—the one disposing of his African, and the other of his English, estates; and it was held that probate might be granted of the English will alone, without requiring the African will to be brought in, but an affidavit exhibiting an attested copy of the latter was required to be filed, and a statement was inserted in the probate that such affidavit had been filed.

BUILDING SOCIETY—NOTICE OF WITHDRAWAL BY MEMBER.

Sibun v. *Pearce*, 44 Chy. D. 354 may be referred to as throwing light on the legal effect of a notice of withdrawal given by a member of a building Society, under the Rules of which Society it was provided that a member who had given notice of withdrawal should cease to take part in the affairs of the Society. The Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) affirming North, J., held that notwithstanding the Rule above referred to, that until the member who had given notice of withdrawal had been paid the amount due to him, he did not cease to be a member, and must be taken into account in ascertaining the majority of members required by statute to sign an instrument for the dissolution of the Society.

PARTIES—PATENT—RIGHT OF MORTGAGOR TO SUE FOR INFRINGEMENT.

Van Gelder v. *Sowerby Bridge Society*, 44 Chy. D., 374, was an action brought by a mortgagor of a patent to restrain an infringement. The mortgagee refused to be made a plaintiff and no application had been made to add him as a defendant. Kekewich, J., before whom the action came on for trial, dismissed the action on this preliminary objection, that the mortgagor could not maintain the action without going into the merits. But on appeal (Cotton, Lindley, and Bowen, L.JJ.) reversed his decision, holding that the mortgagor could maintain the action without the mortgagee being a party, and even if he were a necessary party, the action ought not to have been dismissed, but the Court should have added the mortgagee as a party.

STATUTE—CONSTRUCTION—"OWNER"—RECEIVER.

The short point in *Bacup* v. *Smith*, 44 Chy. D., 395, which Chitty, J. had to consider, was whether under The Public Health Act, 1875, a receiver was an "owner" within the meaning of the Act on whom a notice could be served by the urban authority, requiring him to level and make good the street on which the premises, of which he was receiver, fronted. This question he decided in the negative.

BUILDING SOCIETY—INVESTMENT—DIRECTORS, LIABILITIES OF, FOR LOSSES ON INVESTMENT.

Sheffield & South Yorkshire Permanent Building Society v. *Aizlewood* 44 Chy. D., 412, was an action brought by the liquidator of a building society against the directors of the society to make them responsible for losses occasioned by alleged improper investments. The case is reported at considerable length and involves numerous points which it is impossible here to refer to in detail, but the salient principle deducible from the case is that directors of a building society are not governed in sanctioning investments by the strict rules of law which regulate the duty of trustees, and unless the rules of the society expressly limit their power so to do, they may, in the exercise of the ordinary prudence of business men, invest on second mortgages, and having invested on a second mortgage they may also sanction further advances in order to protect the security, by redeeming the first mortgage, or by taking possession of, and working, the mortgaged property, and paying the rent to which it is subject; and that where an unauthorized security is included as a collateral security for a loan on a security which is authorized, the inclusion of the unauthorized security does not necessarily vitiate the loan altogether, but the propriety of the loan must be tested, as if no such unauthorized security had been included. But although the Court (Stirling, J.) came to this conclusion in favor of some of the defendants who appeared and defended the action, yet other defendants who made no defence were held liable because they had not denied the alleged impropriety of the investments in question.

COMPANY—ALLOTMENT OF SHARES—CONTRIBUTORY—DIRECTORS, APPOINTMENT OF.

In re Great Northern Salt & Chemical Works, 44 Chy. D., 472, was an application by a liquidator of a company in liquidation to settle one Colin Kennedy on the list of contributories. The application was resisted on the ground that there had been no valid appointment of directors, and therefore that there had been no allotment of shares, and that there was no evidence of any valid allotment. The case turns, to some extent, on the provisions of the English Companies Act, 1862. The points decided by Stirling, J. were, first,—that a memorandum signed by all the subscribers of the articles of association appointing directors was valid without their holding any meeting for the purpose. Second, that though the Act provides that, at the first ordinary meeting, the first named directors shall retire, yet where they did not retire, but a resolution was passed continuing them as directors, it was valid. Thirdly, that where four directors have resolved that two of them shall be a quorum, an allotment of shares made by

two of them was valid. As regards 300 shares in respect of which Kennedy was claimed to be liable, he admitted that he had applied for them, and had received an allotment of them. By the company's allotment book it appeared that the 300 shares were alloted to him on Sept. 20th, 1888, but no minutes were kept after August 20th, 1888. At the time the company was ordered to be wound up, Kennedy appeared on the register as holder of 500 shares. As Kennedy was a contributory in respect of 200 shares it was held that under section 154 of the Act, the allotment book was *prima facie* evidence against him of an allotment of the 300 shares, and, coupled with his admission, threw upon him the burden of proving that the allotment was invalid which he had not discharged.

WILL—CONSTRUCTION—LEGACY—GIFT TO NEXT OF KIN OF PERSON DEAD AT DATE OF WILL—PERIOD OF ASCERTAINMENT OF CLASS.

In re Rees, Williams v. *Davis* 44 Chy. D., 484, Stirling, J., was called on to construe a will whereby a testatrix, who was a widow, bequeathed her personal estate "to such person or persons as would have become entitled to my said husband's personal estate under and by virtue of the Statute of Distributions had he died intestate, and without leaving any widow him surviving." The statutory next of kin at the time of the husband's death were M. S. and R. R., who were both alive at the date of the will, but M. S. predeceased the testatrix. The learned judge came to the conclusion that the words "without having any widow him surviving" took the case out of the general rule laid down in *Wharton* v. *Barker*, 4 K. & J., 483, 502, and that the persons to take must be ascertained at the death of the husband, and consequently that the share of M. S. had lapsed.

VENDOR AND PURCHASER—MORTGAGEE SELLING UNDER POWER—OFFER TO CONCUR IN SALE BY PARTIES INTERESTED IN EQUITY OF REDEMPTION—WAIVER OF NOTICE.

In re Thompson and Holt, 44 Chy. D., 492, mortgagees had sold under a power of sale in their mortgage, but they had not given the notice required, but the sale was had with the approval of the parties interested in the equity of redemption, subject to a condition of sale which stipulated that the purchaser should accept a conveyance from the vendors without the concurrence of any other persons. Subsequently, upon an objection being raised by the purchaser to the right of the vendors to sell under the power without notice, the parties interested in the equity of redemption agreed to concur in the sale. Upon an application under *The Vendors and Purchasers Act* it was held by Kekewich, J., that the parties interested in the equity of redemption had in effect waived notice, but the order affirming the Chief Clerk's certificate in favor of the title was prefaced with a declaration that the owners of the equity of redemption were willing to concur in the sale, and that the vendors undertook, at their own expense, to procure them to join in the conveyance.

TRADE MARK—WORDS CALCULATED TO DECEIVE.

Turning now to the Appeal Cases we find in *Eno* v. *Dunn*, 15 App. Cas., 252, that the House of Lords have reversed the judgment of the Court of Appeal (41

Chy. D., 439, noted *ante* vol. 25, p. 465) and hold that The Patents Design and Trade Marks Act, 1883, confers upon the comptroller a discretion whether to register a trade mark or not, and that he ought to refuse to register where it is not clear that deception may not result. In the present case the respondent claimed to register as a trade mark "*Dunn's Fruit Salt Baking Powder.*" The appellant had, for many years, used the words "Fruit Salt" as a trade mark for a powder used in producing an effervescing drink, and opposed the application. The majority of the house (Lords Watson, Herschell, and Macnaghten) were of opinion on the evidence that the respondent's proposed trade mark was calculated to deceive, and registration ought to be refused, but from this view Lord Halsbury, L.C., and Lord Morris dissented.

SHARES—PLEDGE OF CERTIFICATES—BLANK INDORSEMENT—BROKERS—FRAUDULENT TRANSFER—ESTOPPEL.

In the *Colonial Bank* v. *Williams*, 15 App. Cas., 267, the House of Lords have unanimously affirmed the decision of the Court of Appeal, 38 Chy. D. 388, which we noted *ante* vol. 24, p 456. It may be remembered that the subject of the contest was certain shares in the New York Central Railway Co. The owner of these shares held certificates which stated that the shares were transferable in person or by attorney on the books of the Company only on the surrender and cancellation of the certificates by an indorsement thereof. The indorsement was in the form of a transfer for value received, blanks being left for the names of the transferor and transferee, with a power of attorney in blank to carry out the transfer. On the death of the owner his executors, in order that the shares might be registered in their own names, signed, as executors, the transfers on the back of each certificate without filling up the blanks, and sent the certificates to their broker, who fraudulently deposited the certificates with a bank, which took them *bona fide*, and without notice, as security for advances. The bank retained the certificates and took no steps to register the transfers. By the law of New York such a delivery of the certificates with signed transfers by the registered owner would estop him from setting up his title against a purchaser for value without notice. But neither on the New York nor London Stock Exchanges are such transfers signed by executors, treated as being in order, or as sufficient security for advances unless duly authenticated. Their Lordships determined that as all the dealings with the certificates had taken place in England, the rights of the parties were governed by English law, and that, as the conduct of the executors in signing and delivering the transfers was ambiguous, and according to the evidence was consistent with their intention to have themselves registered as owners, they were not estopped from setting up their title as against the bank, which ought to have enquired into the broker's authority.

Correspondence.

THE PARDONING POWER.

Editor of THE CANADA LAW JOURNAL:

The decision of the Chancery Division of the High Court of Justice in the case of *Canada* v. *Ontario*, upholding the constitutionality of the Ontario statute 51 Vic., cap. 5, enabling the Lieutentant-Governor to pardon offences committed under the laws of that province, is so important as to challenge criticism.

The first section of the statute which has been upheld, would seem to be a mere affirmance of the power given to a Lieutenant-Governor by section 65, of the B. N. A. Act, though the language is by no means the same, and there would appear no great objection to it from a Dominion point of view, especially as it is made, "subject always to the royal prerogative."

The difficulty which this Ontario statute presents arises from the second section, which provides that "the powers mentioned in the first section shall be deemed to include the power of remitting sentences for offences against the laws of this province." The question then is, was it competent for the Legislature of Ontario to confer the prerogative of pardoning the offences referred to upon the Lieutenant-Governor. The three judges of the Chancery Division of the High Court of Justice have held that it was, though the learned Chancellor was the only one who gave a written judgment on the subject. It might here be incidently remarked that the practice which some judges adopt of merely "concurring" in the written opinions of other judges instead of preparing written opinions for themselves, to borrow a remark made in Taylor on Evidence (section 25, latter part) as to a certain peculiar habit some judges have of addressing jurors, "though sanctioned by the practice of many able but somewhat lazy judges, is but little calculated to promote the attainment of truth."

The learned Chancellor in his polished judgment has allowed several important sections of the B. N. A. Act to escape his distinguished attention, and the result is both surprising and disappointing. If he had referred to section 12 with reference to the powers of a Governor-General, he would have seen that the same language was used with reference to the powers of His Excellency as are used in section 65 with reference to the powers of a Lieutenant-Governor, with this important addition, "as far as the same continue in existence," which is not to be found in section 65. Surely this 12th section means that the prerogative rights of the crown, which the Queen's representative had before Confederation been wont to enjoy and exercise under express grant from the crown, were to continue unimpaired, especially as they are re-granted to every succeeding Governor-General of Canada, so that section 65 is subordinate to section 12.

Now the power to pardon is a branch of the prerogative of the crown. It belongs to the king *de facto* and not to the king *de jure*. It is an uncommunicable prerogative except by grant from the crown: Chitty on Prerogative, 89-90; so that if there be no grant of prerogative there can be no prerogative to exer-

cise. The Chancellor substantially says it springs from the other powers conferred—practically that it is implied from those powers, but the above quotation from Chitty shows it is "incommunicable" except from special grant from the crown and therefore it cannot be implied.

But there is a further answer which arises from an indisputable proposition that the prerogatives of the crown cannot be taken away except by express words (*vide Cushing* v. *Dupuy*, Cartwright 252); and to this proposition, it will be seen that that part of the first section of the Act which we have quoted above, declaring that it is "subject always to the Royal prerogative, as heretofore," gives an unqualified support. But how is the expressed intention of that part of the section, so inconsistent with the other parts of the document, to be carried out? Mr. Mowat virtually says in one place, that the Royal prerogative of mercy is not to be extended towards the thousands of saloon-keepers who obtain their licenses from him, and therefore love him and keep his political commandments, but who nevertheless violate his criminal laws, yet that it is to be exercised. Was it intended that the latter part of the first section should only receive the distinguished consideration of saloon-keepers and not that of the court? To try and make the holders of Provincial licenses, in a sort of Masonic signal kind of way, understand—and a nod is as good as a wink to a Grit—that if they did not support him, he could not stoop to advise the exercise of the Royal clemency in his favor; but that, if they did, he might.

While giving Mr. Mowat time to answer this latter question, which he might find it difficult to do without "consideration," let us ask him how he can make the first and second sections of the Act harmonize? One section says the Act *is* to be subject to the Royal prerogative, another says that it is *not;* that, on the contrary, the Royal prerogative is to be exercised. How is that? Are they not contradictory? Is harmony, therefore, between them not quite impossible? Does not the question suggest that the statute attacked is a fair specimen of Mr. Mowat's usual and brilliant way of expressing himself in the Acts of his Legislature, and which make the laws of that body such light and entertaining literature for the young men of the profession?

But how is it that the learned Chancellor did not try to reconcile the last clause of this first section with the second section? Why did he not attempt an explanation of the paradox, or even say something about it? Was it not because, in view of the avowed objects of the Act, he considered it nonsense?

The court had less reason to avoid another limb or twig of the Act attempting to confer the powers in question upon the Lieutenant-Governor, viz.: that part which says, "over which the legislative authority of the Province extends." We venture to think the court had less reason to avoid that portion of the Act, because it is consistent with the purpose of the Act itself, and because at all events, Mr. Justice Ferguson, on the argument, thought it created formidable difficulty, and it was due to his dialectic wrestling with it that it should have been considered in the court.

There are, however, other parts of the Union Act which escaped the eagle eye of the learned Chancellor, and from which a strong argument against the

constitutionality of the local statute in question may be derived, viz.: sub-section 27 of section 91 and sub-section 14 of section 92, which both expressly and impliedly prohibit a local legislature from passing a criminal "procedure" Act. Conceding that a local legislature has power "to impose a fine, penalty or imprisonment, to enforce any provincial law" under sub-section 15 of section 92 which is, that it has power to that extent to create an offence or crime, as to which there can be no doubt, still, it is perfectly plain from the two sections quoted, that authority to provide "procedure" in such a case of the creation of a crime by a local legislature can only come from the Parliament of Canada.

This shows that a local legislature though it has power to impose a fine, etc., to enforce any provincial law, has not complete control over the subject involved in such a law, and that it was intended to restrict its functions within certain limitations. This was only natural in a legislative body which was to be only an arm of the body of Parliament, and excludes the idea that such an arm was to have all the force of the whole body. Powers or incidents, therefore, which might be inferred from, or regarded as attached to, a perfect body, cannot be said to spring from a mere part of the body, otherwise a part would be equal to the whole which would be absurd.

There is a great difference between the source from which the powers which were conferred upon Lieutenant-Governors before confederation were derived and that, from which such functionaries derive their powers under the B. N. A. Act, because, while in one case power was conferred by direct and special grant from the crown and unlimited, in the other it was not only not conferred by the crown, for the crown is not a part of the local legislature, but the power is expressly limited by the act of union. In other words the power in the former case is expressly given by grant and is unlimited; in the latter it is not given by grant from the crown at all, and is limited within certain defined boundaries by the Imperial Parliament. The authority, there, cited by the learned judge, viz.: *Re Bishop of Natal* v. *Crown* 3 Moo., N.S. 148, has no application to the Ontario statute at all.

Then, might it not be urged that the exercise of the royal clemency is a question of "procedure"? It was so treated in our former criminal procedure act, 29 and 30 Vict., cap. 28, section 126, and though it now forms part of cap. 181, entitled "An Act respecting Punishments, Pardons and Commutation of Sentences," it is still not a matter of "procedure"? Besides does this enactment, giving His Excellency exclusive power to exercise the prerogative of pardon, not show an express intention on the part of Her Majesty to prohibit its exercise by any other person?

Expressio unius est exclusio alterius.

But, without reference to these last points, is the conclusion to be drawn from the preceding reasoning not irresistible, that the local statute in question is clearly *ultra vires*, and that the judgment in question instead of having been given for the Province should have been given for the Dominion?

LEX.

Notes on Exchanges and Legal Scrap Book.

OUR JUDGES.—Is it possible that that swearing parson from North Carolina has succeeded to the editorial charge of the *American Law Review?* In the current number of the *Review* is an account of a British judge, who said to counsel who was cross-examining a witness as to his religious belief, and had asked him if he believed in God, "Who does?" and intimated pretty clearly that he did not. This incident, says the *Review*, has caused some pious person "spasms in the bowels." This seems a rather coarse way of putting it, but perhaps the *Review* writer had Judas in his mind. We do not wonder that people were shocked by the incident. It seems shocking to us that a judge should not believe in God, and still more that he should parade it. In our opinion, no man is fit to be a judge who does not believe in God. How can a man so destitute of reason as to deny the existence of God be qualified to pronounce the law, which has been said to be "the perfection of reason"? We do not insist that a judge should believe in a devil or a devilish God, but if we had a suit in court we should much prefer to have it tried by a judge who believes in a beneficent God, and in some reasonable way holds himself accountable to Him. Probably there are very few atheists who would not prefer to be tried by a judge who acknowledges a supreme ruler. Even the worst criminals would prefer to be tried by a magistrate who bows to a higher power than man. What a farce it would be to allow a judge who does not believe in God to shut a man up in prison for years for perjury! The faculty of judging is a truly divine attribute, and when a human being exercises it he comes nearest to the functions of the Judge of all the earth. —*Albany Law Journal.*

A NEW LAW FOR BOOK BUYERS.—The amazing amount of litigation of late years, caused by the advent of the individual commonly known as the "book-fiend," has become such a remarkable feature of Australian social life that in New South Wales a Bill has been introduced into the Legislative Council to restrict, or rather to define, the nature and form of the contract for the purchase of books in parts that are to be delivered. At present, of course, buying a book or illustrated series of works of whatever description is subject only to the ordinary laws of contract and evidence. The result has been in effect calamitous in many cases to alleged buyers, because there is not the slightest doubt in the minds of most practising lawyers that a vast amonnt of perjury and forgery has been committed in reference to these matters during the last few years, to say nothing of the expense incurred by unfortunate litigants. It is the weight of such considerations as these that has stirred legislation in New South Wales to seek for a remedy and preventive; and the problem is how, without unnecessarily limiting the ordinary freedom of contract, safeguards may be raised for the purchaser against the wiles or the fraud of the canvasser and his satellites. Dr. Creed, who has introduced the Bill in New South Wales, proposes to do this by having a peculiar form of contract, with certain portions of it to be written in red ink and

so forth; arguing, doubtless, that the unusual appearance of the document will be both a warning to the unwary, and a material help to jog the memory of the purchaser when brought to Court, or threatened with legal proceedings. We think this well enough as far as it goes, but we contend it does not go far enough, as it does not really grapple with one of the most characteristic evils of the book canvassers' business, viz., the risk of forgery of signature which is incurred by the alleged purchaser. Given as these orders for books often are, in lonely places in the country, by persons not fairly matched in dealing capacity with the over-persuasive book fiend, nothing would be easier than to have these contracts with their colored inks prepared for proof as is done now-a-days. These would simply be a substitution for our old friend the indelible (so called) blue or purple pencil, a form of contract which would have the function of law, and would therefore probably be all the harsher in its effect against the alleged buyer. We think what is wanted is the protection of the buyer by independent evidence outside the contract; that is the evidence of witnesses who were present at its formation and who can swear that the signature is genuine. To accomplish this we would recommend the insertion of a provision in the proposed Act which would insure the presence of witnesses. If, for instance, it were compulsory, in every contract of this kind, that it should be signed in the presence of a witness who should also sign it at the same time, perfect safety against fraud would be insured, especially if it were a condition that the witness should not be an assistant of the plaintiff or of the canvasser. The presence of a little flesh and blood like this is worth fifty conditions as to red ink or the particular size and shape of the paper on which the contract is to be made.

There is another, and perhaps more important, point to be considered, however, and that is whether contracts of this kind which involve the delivery of a book or work of art (so called) at a future date in parts should not be decreed to be void if the terms are not fulfilled to the letter, in other words that time should be of the essence of the contract, and that a breach in that respect should make the whole voidable. A buyer very often contracts that certain numbers should be delivered, and paid for, at regular intervals, and he finds after a lapse of time that a pile of volumes are delivered at one blow, and a demand made for the price, which was manifestly not the intention of the contract at the date of its making. These suggestions are apart altogether from the larger questions as to whether the practice of book-hawking ought not to be forbidden altogether. When we inquire into the merits of the bargain and seek to find what is the worth of volumes or pictures which is being proffered, we discover that it is generally grossly inadequate to the price asked. Perhaps this is an evil inevitable under a system of credit, and under the present composition of human nature. While on the one hand the public should be protected against fraud, on the other the practice of spoon-feeding adults by grandmotherly legislation may create greater evils than those it is proposed to cure. Perhaps a reasonable solution of the credit system as applied to book-canvassing would be a declaration by Act of Parliament that all contracts of the sort which were not to be completed and were not actually completed within a year should be voidable at the option of the pur-

chaser. This qualification of contracts would pretty effectually stop the present iniquitous system of hawking about rubbish under the name of literature and art at a high price.—*The Australian Law Times.*

CONTEMPT OF COURT BY NEWSPAPERS.—Owing to the recent decision in *O'Shea* v. *O'Shea and Parnell* public attention has been much called to the law of contempt of Court by newspapers pending the hearing of legal proceedings. In that case, it will be recollected, the printer and the publisher of *The Freeman's Journal* was fined £100 and costs for contempt of Court, viz.: the publication in that paper of an article commenting on the above suit before it came on for hearing. Another similar motion was brought the other day in Dublin against *The Dublin Evening Mail* in connection with the yet unheard case of *Lynch* v. *Macan.* So, too, in *Peters* v. *Bradlaugh* (4 Times L. R. 414), the editor of *St. Stephen's Review*, was fined £20 and all costs for inserting some parapraphs in that paper calculated to prejudice the defendant in the conduct of his defence. Had he not given an ample apology the fine would probably have been much heavier. Political motives were held—and rightly held—in that case to be no justification, but quite the reverse. Lord Hardwicke, C., in 1742, laid down a classification of contempt of Court which has always been adopted. One kind of contempt consists in scandalising the Court itself; secondly, in abusing parties who are concerned in causes in the Court; thirdly, in prejudicing mankind against persons before the cause is heard. There cannot, says he, be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters. It is necessary, therefore—to constitute contempt of Court—that the contempt should be in court, or that it should be contempt of a Judge sitting in Court. All that is necessary is that it should be a contemptuous interference with judicial proceedings in which a Judge is acting as a judicial officer. It is a contempt, not of the Judge, but of the High Court, as a Judge of which he is acting. The principle is equally applicable to a Master of the Court exercising judicial functions. Distance, in point of time or space, should be a matter taken into consideration when determining whether there has been an interference with the course of justice: *per* Lord Esher, M.R., in *Re Johnson*, 20 Q. B. D., 71. So again, "The object of the discipline enforced by the Court in case of contempt is not to vindicate the dignity of the Court or the person of the Judge, but to prevent undue interference with the administration of justice, and that is the question in each case": *per* Bowen, L.J., in *Helmore* v. *Smith*, 35 Chy.D., 455. It would not, as a rule, be worth the while of a Judge to take any steps, as far as his personal dignity is concerned, but attempts are often made by persons to interfere with the ordinary course of justice. Sometimes, though rarely, it is done by an attack on the Judge, sometimes by trying to induce him to change his opinion by flattery or bribery. The most common mode (of which we have recently seen only too many instances in Ireland) is by attacking, deterring, or frightening witnesses. Another way is by commenting, and thus appealing to the public by

statements made *en parte* to prejudice the case without even hearing the other side. The Court has a summary jurisdiction to interfere and prevent this being done (*Skipworth's case*, L. R. 9 Q. B., 232; *Carleton's case*, 2 My. & Cr., 316); and we purpose reviewing the somewhat numerous and important decisions bearing on the subject. Newspapers frequently commit technical contempt of Court by publishing reviews or comments on judicial proceedings whilst they are *sub judice*. It has often been laid down that a publication before a cause has begun, if tending to prejudice the parties, is contempt, and renders the publisher liable to committal: *Tichborne* v. *Tichborne*, 39 L. J., Ch. 398; *Macartney* v. *Corry*, 9 Ir. R. C. L., 242; *Reg.* v. *Parnell*, 14 Cox, C. C., 474; *Hunt* v. *Clarke*, 61 L. T., 343. The ground of the contempt is that the report may prejudice the trial: *Daw* v. *Eley*, 7 L. R., Ex. 55; *Tichborne* v. *Mostyn*, ib. If the minds of either the judge or the jury who are to try the case, or the witnesses in it (*Guilding* v. *Mosel*, 4 I. L. R., 198), might have been injuriously affected by it, the publication is a contempt. The reason for committing persons thus acting for contempt is not merely for the sake of the party injured by the publication, but for the sake of the public proceedings in the Court, to hinder advertisements or publications tending to prepossess people as to the proceedings in the Court: *Anon.* 2 Ves. sen., 520. It is for the protection of the Court itself and not owing to the offences against any given individuals. Malins, V. C., says: "It appears to me that whenever a newspaper, either on its own motion or at the instigation of others, publishes the proceedings in a case before the hearing, it tends to prejudice the minds of the public." "As regards intention to prejudice, you can only judge of men's intentions by their acts": *The Cheltenham & S. Ry. C. Co.*, L. R. 8 Eq., 583. But surely it is not to be inferred from this that *any* mention by a newspaper of a cause about to be heard or *any* comment not malevolent, untrue or libellous, made before the hearing, is, in itself, a contempt; unless the publication really interferes with the course of justice the Court ought not to interfere: *Plating Company* v. *Farquharson*, 17 Chy.D., 49; *Vernon* v. *Vernon*, 40 L. J., Ch. 118. The Court will not restrain even the publication of every unfair report purporting to represent what takes place in open Court: *Brook* v. *Evans*, 29 L. J., Ch. 616. Cotton, L. J., thus lays down the principles which should regulate applications to commit newspapers for contempt: "There should be no such application made unless the thing done is of such a nature as to require the arbitrary and summary interference of the Court in order to enable justice to be duly and properly administered without any interpretation or interference. This is what we have to consider. The question is not whether, technically, a contempt has been committed, but whether it is of such a nature as to justify and require the Court to interfere": *Hunt* v. *Clarke*, *supra*. The exercise of this jurisdiction to commit should be most jealously and carefully watched, and exercised with the greatest reluctance and the greatest anxiety on the part of the Judges to see whether there is no other mode not open to the objection of arbitrariness, and which cannot be brought to bear upon the subject: *Re Clements*, 46 L. J., Ch. 375. The reason, says Fry, L. J., why the Court interferes in a summary manner when such prejudice is created, is the natural tendency to pre-

vent a fair trial, and the very fact that we have a lay element in the jury renders it all the more incumbent upon public writers not to attempt by innuendo or in any manner whatever to influence the mind of the public before the trial takes place. But on the other hand, there is an anxiety on the part of the Court not to encourage trifling and useless applications, and not to assist applications made for summary jurisdiction when there are other and less summary modes of relief. If, therefore, the motion for attachment is not a *bona fide* one, but merely seeks to mulct the defendant in costs, and the publication is not calculated to influence or substantially prejudice the Court or jury in its decision, an order to commit will not be granted.—*Irish Law Times.*

PAYEE'S METHOD OF REDRESS IN CASES OF FORGERY.—The following interesting communication from a New York city reader has been received:

"Having recently had my attention called to a method of procedure in obtaining redress in a class of cases only of too frequent occurrence in banking circles, where drafts are stolen and payment obtained upon forged indorsements, I take the liberty of bringing it to your notice, with the view that if it impresses you as of sufficient interest, you might give it attention in your valuable journal. I am inclined to believe that it will so impress you, judging from the surprise manifested by bank officers and even by their attorneys, when first made known to them by a practical illustration. Not being versed in legal phraseology, perhaps I can more clearly explain myself and the method of procedure to which I refer by citing an imaginary transaction, or series of transactions, involving the method referred to, and being a first example I give it very fully.

"A. is a merchant of this city, selling goods through the various states, receiving payment in drafts drawn upon various New York city banks, payable to or indorsed to his order, purchased by his customers from their local banks for remittance. A.'s trusted employee, having access to the mail, purloins his draft or drafts, and, forging his indorsement, obtains payment from the bank upon which they are drawn, either directly or indirectly. Sooner or later discovery follows. How shall A. obtain redress? To write to his customers, notifying them of his loss, with request that they seek redress from the parties from whom they purchased the drafts, who in their turn would seek redress from their New York correspondents, was and is, if I mistake not, the usual custom, entailing a long and tedious correspondence if nothing more, especially when the drafts have passed through several hands.

"Recently, in certain cases of this character which have come under my observation, a different method of procedure has been followed, whether new and novel, I am not competent to say. Certainly it so appeared to me, and I should judge it so appeared to others from the astonishment it provoked; astonishment not at the nature of the fraud, which is common enough, but at the method by which redress was sought, and at the quarter from which it proceeded.

"In these recent cases, of which A.'s is an example, the following was the course pursued: A., instead of reaching through his distant customers to obtain

redress and, of course, awaiting the success of their efforts in a like pursuit, obtains through them, or the distant banks, sellers of the drafts, the returned cancelled vouchers, learns from an inspection of them the names of the banks collecting from the New York bank upon which they are drawn, they being likewise almost invariably banks of this city, and then makes his demand direct upon the latter for unlawful collection and conversion, thus saving the delay and trouble of the old method first described, and greatly narrowing the field of battle and concentrating the opposing forces. In the instance last brought to my knowledge, wherein a large number of drafts were included, drawn upon and collected by various different banks—the demand for redress being made by what I have termed the new method—the effect produced upon the minds of the officers of the banks was invariably one of astonishment, mingled with amusement—not at the nature, but at the source or position of the party making the demand.

"To return to A.: applying draft in hand for redress, he is met with a smile or frown of superior wisdom, depending upon the amount of money involved, and politely informed that he is not known in the matter, and that the only one in a position to call the bank collecting the draft to account is the bank upon which it is drawn, and that he must seek relief elsewhere. Mr. A. replies: 'You may not know me in the matter, but I know that you have unlawfully collected and converted to your own use a draft belonging to me, bearing a forged indorsement; and pay you will, or I sue.' B., the bank president, is puzzled. He little relishes the accusations of forgery and unlawful collection and conversion, and yet the facts as stated carry a strong flavor of truth that is alarming. 'Hold on, my dear friend,' says B., maintaining his official dignity; 'if the indorsement is a forgery, as you state, of course we will have to pay sooner or later, but you entirely mistake the way to go about it, don't cher know,' etc., etc.

"A consultation of lawyers of A. and B. follows, preparation of affidavit, perhaps, and reference to recent cases such as *Robinson* v. *Chemical Bank*, 86 N. Y., p. 404, and *People* v. *Bank of N. America*, 75 N. Y., p. 547, is made, and, presto! a satisfactory conclusion is reached between A. and B.—a conclusion satisfactory to A. because speedy redress follows, and satisfactory to B. because he would have had to pay, in any event, ultimately; and, if so, the sooner he is in position to hit back at his depositor or the party from whom he received the spurious draft, the better.

"I have been thus prolix because I am unaccustomed to boil down my words in lawyers' style, but if I have succeeded in adducing anything new and interesting to some of your readers, my success in so doing—otherwise my good intentions—must be my apology."

The method of procedure thus disclosed is interesting, and is an application of the "short-cut" principle for which the American people are famous. In cases of loss, before indorsement, by a payee or subsequent indorsee, and collection through forgery, a frequent method of redress, as shown by our contributor, is for the payee or indorsee to look to antecedent parties for reimbursement, they in turn coming down on the paying bank, and the latter seeking to recover from

the receiving bank in case the paper has been paid to such bank, and not directly to the forger. This old method, as he terms it, is tedious and circuitous, taking a long time to reach the party finally liable; and hence the adoption in New York of a new method of procedure whereby the payee or indorsee proceeds direct to the fountain of ultimate liability, and is enabled to immediately quench his thirst for redress.

But we are sorry to disappoint our contributor by saying that the honor for the invention of this new process rests not with New York, but that a man in Indiana named *Holtsclaw* appears on record as having hit upon about the same thing. *Indiana Nat. Bank* v. *Holtsclaw*, 98 Ind., 85.

Holtsclaw was payee of a draft. His name was forged, and Indiana National Bank purchased the draft from the forger. Subsequently it collected it from the paying bank. Holtsclaw brought suit against the Indiana National Bank and was allowed to recover the amount the latter had collected on the draft. The case was a little different from the case put; nevertheless, it presents the idea of feature of the payee looking directly to the collecting bank for redress. Holtsclaw did not have possession of the draft when he brought suit, but had previously demanded it. Furthermore, Holtsclaw had originally sued both check drawer and bank, but amended by dropping the check drawer and continuing against the bank.

Upon this subject of payee's method of redress, the suggestion may be presented of still a third method, also "short cut," which in certain cases might prevail, namely, remedy by the payee or indorsee against the paying bank to obtain a second payment. Of course, the new method suggested by our contributor would only apply to those cases where a check or draft had been collected through the mediumship of a collecting bank ultimately liable to refund. Where payment has been made by the drawee to the forger direct in a case where it is concededly ultimately liable, the expediency of a second payment to the true owner, thus avoiding the circuity of action heretofore described, is apparent. But if the paying bank refuses, has the payee any legal right to demand payment?

There is a conflict in the laws of many states whether the holder of a check or draft before acceptance has any right of action against the bank thereon. In some states he has; in others, he has not. In those states where the holder of an unaccepted check has such a right of action, this method of procedure would be open to him. But in states where the contrary is held, such as New York, Pennsylvania, and many others, what would be his rights after loss, forged indorsement, and payment to the forger?

The cases on this point have been collected and the question discussed in an article in volume 2, page 228, of this publication, under the title "Liability to true owner after payment of check to wrong party," and the prevailing rule—Tennessee contra—wherever the holder of a check or draft cannot sue the bank before acceptance, is shown to be that the act of payment to a wrong party does not constitute an acceptance by the bank entitling the real owner to sue. Ordinarily, therefore, in such jurisdictions, the payee would not have such a right of action. But, nevertheless, circumstances might be such that he could maintain the action, and we will cite *Graves* v. *The American Exchange Bank*, 17 N. Y., 205, as an instance. There the drawee bank had paid a draft on the forgery of the payee's signature. The real payee demanded the draft from the paying bank. It refused. He then brought suit for the *conversion of the draft*, was adjudged the true owner entitled to its possession, and the bank having refused to give it up, was held liable for its conversion.

But suppose the bank had given it up, or had previously surrendered it to the drawer. In such case, under the law previously announced, the payee would probably have no legal remedy against the bank.—*Banking Law Journal.*

DIARY FOR OCTOBER.

1. Wed.....County Court Non-Jury Sittings except in York. William D. Powell, 5th C J. of Q. B., 1816.
5. Sun.....*18th Sunday after Trinity.*
6. Mon.....County Court Sittings for Motions, except in York.
7. Tues....Henry Alcock. 3rd C.J. of Q.B . 1802. R. A. Harrison, 11th C.J. of Q.B., 1875.
8. Wed.....Sir W. B. Richards, C.J. Sup. Ct., 1875.
11. Sat.....County Court Sittings for Motions, except in York, end. Columbus discovered America 1492.
12. Sun.....*19th Sunday after Trinity.* Battle of Queenston, 1812.
13. Mon.....County Court Sittings for Motions in York begin. Sur. Ct. Sittings
15. Wed.....English law introduced into Upper Canada, 1791.
18. Sat.....St. Luke. County Court Sittings for Motions in York end.
19. Sun.....*20th Sunday after Trinity.*
20. Mon.....County Court Non-Jury Sittings in York. Last day for Law Society notices.
21. Tues.....Battle of Trafalgar, 1805.
22. Wed.....Supreme Court of Canada sits.
23 Thur....Lord Lansdowne, Governor-General, 1883.
24. Fri.....Sir. J. H. Craig, Governor-General, 1807.
26. Sun.....*21st Sunday after Trinity.*
27. Mon.....Hon. C. S. Patterson, app. Judge of Sup. Ct., 1888. Jas. Maclennan, app. Judge of Ct. of Appeal, 1888.
28. Tues.....Supreme Courts sits. St. Simon and St. Jude.
29. Wed.....Battle of Fort Erie, 1813.
31. Fri.....All Hallows' Eve.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Ont.] [March 10.

O'KEEFE v. CURRAN.

Partnership—Terms of—Breach of conditions—Expulsion of one partner—Notice—Waiver—Good-will.

Partnership articles, for a firm of three persons, provided that if any partner was guilty of breaking certain conditions of the terms of partnership the others could compel him to retire by giving three months' notice of their intention so to do, and a partner so retiring should forfeit his claim to a share of the good-will of the business. One of the partners having broken one of said conditions the others verbally notified him that he must leave the firm; and to avoid publicity, he consented to an immediate dissolution, which was advertised as "a dissolution by mutual consent." After the dissolution the retiring partner made an assignment of his good-will and interest in the business, and the assignee brought an action against the remaining partners for the value of the same.

Held, reversing the judgment of the court below, FOURNIER, J., dissenting, that the action of the defendant in advertising that the dissolution was "by mutual consent" did not preclude them from showing that it took place in consequence of the misconduct of the retiring partner; that such advertisement could not be invoked to support a claim which could have been made if the dissolution had really been by mutual arrangement; that the forfeiture of the good-will was caused by the improper conduct which led to the expulsion of the partner in fault and not by the mode in which such expulsion was effected; and, therefore, the want of notice required by the articles of intention to expel could not be relied on as taking the retirement out of that provision of the articles by which the good-will was forfeited.

Appeal allowed with costs.

Christopher Robinson, Q.C., and *Moss*, Q.C., for the appellants.

McCarthy, Q.C., and *Worrell*, for the respondents.

N.B.] [March 10.

O'BRIEN *v.* O'BRIEN.

Partnership—Action by partners—Set-off—Dissolution—Notice to defendant.

An action was brought by three partners in the lumbering business for the amounts due from the defendant, for whom they had been getting out lumber during the years 1880, 1881, and 1882, as appeared by the accounts made out by the defendant at the end of each year. To this action a set-off was pleaded, the greater part of which was for goods supplied after the year 1882, and the plaintiffs contended that such goods were supplied to one of them only; that the partnership had been previously dissolved and the other plaintiffs had nothing to do with the dealings connected with the set off. The issues involved in the action were, first, whether or not the partnership had been dissolved before the goods covered by the set-off were supplied by the defendant. Secondly, if it had been so dissolved, whether or not the defendant had notice of the dissolution.

On the trial the plaintiffs made a *prima facie* case by proving the accounts of the defendants at the end of each year, showing the several balances claimed in the action, and after evidence was taken on the set-off, the plaintiffs caused the books of defendant to be procured to show that the goods supplied after 1882 were charged to P. B., whereas during the previous years the charges were to P. B. & Bros., the name of the plaintiffs' firm. To rebut

this the defendant was allowed, subject to objection, to show that entries had sometimes been made during the existence of the partnership against P. B., and the judge in charging the jury told them that they could inspect the books and see how they were kept for both periods, and see if there was any difference between the years 1880-83 and the subsequent years.

The jury found the issue in favor of the defendant, who obtained a verdict on his set-off. This was affirmed by the full Court, subject, however, to the defendant consenting to his verdict being reduced by deduction of an amount as to which the trial judge had certified there was not satisfactory evidence, and unless defendant consented to such reduction a new trial would be ordered. On appeal from this decision to the Supreme Court of Canada,

Held, STRONG and GWYNNE, JJ., dissenting, that there was no misdirection in the trial judge charging the jury as he did; that the jury having on the evidence found the facts in favor of defendant and their finding having been confirmed by the full Court, it should not be disturbed; and that substantial justice was done by the reduction of defendant's damages.

Held, per GWYNNE, J., that there should be a new trial; that the evidence from defendant's books, which was objected to, should not have been received; and that the course pursued at the trial, and by the learned judge in his charge, seemed based on the assumption that because the plaintiffs had at one time been partners in special transactions, they should be deemed to be partners subsequently in an entirely different business, which assumption was utterly without warrant.

Held, also, per GWYNNE, J., that the Court had no right to compel the defendant to consent to a reduction of damages, as such a course has never been pursued except in an action for unliquidated damages where the sum awarded was considered excessive.

Appeal dismissed with costs.

G. F. Gregory for the appellants.

Gilbert, Q.C., for the respondent.

N.B.] [March 10.

SEARS *v.* CITY OF ST. JOHN.

Lessor and lessee—Covenant for renewal—Option of lessor—Second term—Possession by lessee after expiration of term Effect of—Specific performance.

A lease for a term of years provided that when the term expired any buildings or improvements erected by the lessee should be valued, and it should be optional with the lessors either to pay for the same or continue the lease for a further term of like duration. After the term expired the lessees remained in possession for some years, when a new indenture was executed which recited the provisions of the original lease, and after a declaration that the lessors had agreed to continue and extend the same for a further term of fourteen years from the end of the term granted thereby, at the same rent and *under the like covenants, conditions, and agreements* as were expressed and contained in the said recited indenture of lease, and that the lessees had agreed to accept the same, it proceeded to grant the further term. This last mentioned indenture contained no independent covenant for renewal. After the second term expired the lessees continued in possession, and paid rent for one year, when they notified the lessors of their intention to abandon the premises. The lessors refused to accept the surrender, and, after demand of further rent, and tender for execution of an indenture granting a further term, they brought suit for specific performance of the agreement implied in the original lease for renewal of the second term at their option.

Held, affirming the judgment of the Court below, RITCHIE, C.J., and TASCHEREAU, J., dissenting, that the lessees were not entitled to a decree for specific performance.

Held, per GWYNNE, J., that the provision on the second indenture, granting a renewal under the like covenants, conditions, and agreements, as were contained in the original lease, did not operate to incorporate in said indenture the clause for renewal in said lease, which should have been expressed in an independent covenant.

Per GWYNNE, J., PATTERSON, J., hesitante, that assuming the renewal clause was incorporated in the second indenture, the lessees could not be compelled to accept a renewal at the option of the lessors, there being no mutual agreement therefor; if they could, the clause would operate to make the lease perpetual at the will of the lessors.

Per GWYNNE and PATTERSON, JJ., that the option of the lessors could only be exercised in case there were buildings to be valued erected during the term granted by the instrument con-

taining such clause ; and if the second indenture was subject to renewal, the clause had no effect as there were no buildings erected during the second term.

Per GWYNNE, J., the renewal clause was inoperative under the Statute of Frauds, which makes leases for three years and upwards, not in writing, to have the effect of estates at will only, and consequently there could be no second term of fourteen years granted, except by a second lease executed and signed by the lessors.

Per RITCHIE, C.J., and TASCHEREAU, J., that the occupation by the lessees after the t rm expired must be held to have been under the lease and to signify an intention on the part of the lessees to accept a renewal for a further term as the lease provided.

Appeal dismissed with costs.

Gilbert, Q.C., and *Sturdee*, for the appellant.

I. Allen Jack for the respondent.

N.B.] [March 10.

VAUGHAN *v.* WOOD.

Dog—Injury committed by—Ownership—Scienter—Evidence for jury.

W. brought an action for injuries to her daughter, committed by a dog, owned or harbored by the defendant, V. The defence was that V. did not own the dog, and had no knowledge that he was vicious. On the trial it was shown that the dog was formerly owned by a man in V.'s employ, who lived and kept the dog at V.'s house. When this man went away from the place, he left the dog behind with V.'s son, to be kept until sent for ; and afterwards the dog lived at the house, going every day to V.'s place of business with him, or his son, who assisted in the business. The savage disposition of the dog on two occasions was sworn to, V. being present at one, and his son at the other. V. swore that he knew nothing about the dog being left by the owner with his son, until he heard it at the trial. The trial judge ordered a non-suit, which was set aside by the full Court, and a new trial ordered.

Held, affirming the judgment of the Court below, that there was ample evidence for the jury that V. harbored the dog, with knowledge of its vicious propensities, and the non-suit was rightly set aside.

Appeal dismissed with costs.

Weldon, Q.C., for the appellant.

Alward for the respondent.

N.B.] [June 12.

FERGUSON *v.* TROOP.

Lessor and lessee—Eviction—Entry by lessor to repair—Intent — Suspension of rent—Construction of lease.

A lease of business premises provided that the lessor could enter upon the premises for the purpose of making certain repairs and alterations at any time within two months after the beginning of the term, but not after, except with the consent of the lessee. An action for rent under the lease was resisted, on the ground that the lessor had been in possession of part of the premises after the specified time, without the necessary consent, whereby the tenant had been deprived of the beneficial use of the property, and had been evicted therefrom. On the trial, the jury found that no consent had been given by the lessee for such occupation, and that the lessee had no beneficial use of the premises while it lasted.

Held, per TASCHEREAU, GWYNNE, and PATTERSON, JJ., reversing the judgment of the Court below, that the evidence did not justify the finding of no assent ; that an express consent was not required, but it could be inferred from the conduct of the tenant ; and there being no limitation of time for the completion of the repairs, the limitation being confined to the entry, and there being evidence that the lessee acquiesced in the occupation by the lessor after the time limited, the plea of eviction was not proved.

Held, per RITCHIE, C.J., and STRONG, J., approving the judgment of the Court below, that the jury having negatived consent by the lessee, and having found that the interference with the enjoyment by the tenant of the premises was of a grave and permanent character, the rent was suspended in consequence thereof.

Held, per PATTERSON, J., that interference by a landlord with his tenant's enjoyment of demised premises, even to the extent of depriving the tenant of the use of a portion, does not necessarily work an eviction ; a tenant may be deprived of the beneficial occupation of the premises for part of his term by an act of the landlord which is wrongful as against him, but unless the act was done with the intention of producing that result it would not work an eviction.

Appeal allowed with costs.

Gilbert, Q.C., for the appellant.

Weldon, Q.C., for the respondent.

Ont.] [June 12.

HISLOP *v.* TOWNSHIP OF MCGILLIVRAY.

Municipality—Duty of—Road allowance—Obligation to open—Substitution in lieu thereof—Jurisdiction of court over municipality—C.S.U.C., c. 54.

H. was owner of, and resided on, a lot in the eight concession of the Township of McGillivray, and under the provisions of C.S.U.C., c. 54, an allowance was granted by the township for a road in front of said lot. This road was, however, never opened, owing to the difficulties caused by the formation of the land, and a by-law was passed authorizing a new road in substitution thereof. Some years after H. brought a suit to compel the township to open the original road, or, in the alternative, to provide him with access to his lot, and also to keep said road in repair, and pay damages for injuries caused by the road not having been opened.

Held, affirming the judgment of the court below, that the provisions of the act C.S.U.C., c. 54, requiring a township to maintain and keep in repair roads, etc., and prohibiting the closing or alteration of roads, only applied to roads which have been formally opened and used, and not to those which a township, in its discretion, has considered it inadvisable to open.

Held, also, that the courts of Ontario have no jurisdiction to compel a municipality, at the suit of a private individual, to open an original road allowance and make it fit for public travel.

Appeal dismissed with costs.

R. M. Meredith for the appellant.

W. R. Meredith, Q.C., for the respondents.

Ont.] [June 12.

GRANT *v.* BRITISH CANADIAN LUMBER CO.

Action for discovery—Possession of company's books—Evidence.

G. was for some time manager of the British Canadian Lumber Co., and his services were dispensed with by written notice which directed him to hand over the books, etc., to a person named. He demanded an audit of the books, which was begun and partially finished, and while the books were, presumably, in an office formerly occupied by G. as such manager, he ejected from said office a liquidator of the company, which had become insolvent. In an action against G. to compel him to hand over the books or make discovery as to where they were, he alleged that they were not in his possession, or under his control. The trial judge held that they had been in his possession when the liquidator was ejected from the office and that the defence was not made out. He made an order for discovery and his judgment was affirmed by the Divisional Court and the Court of Appeal. On appeal to the Supreme Court of Canada,

Held, affirming the judgments of the courts below, that the judgment of the trial judge, who saw and heard the witnesses, affirmed as it was by two courts, should not be interfered with, only matters of fact being in issue.

Appeal dismissed with costs.

Hoyles, Q.C., and *Wild*, for the appellant.

W. Cassels, Q.C., and *Gordon*, for the respondents.

Ont.] [June 12.

TITUS *v.* COLVILLE.

Solicitor — Action by—Professional services—Election petition—Evidence—Questions of fact.

T., a solicitor, brought an action for professional services rendered in the conduct of a petition against the return of a member of the legislative assembly of Ontario. The defendants in the action were respectively the president, secretary, and treasurer of the Liberal-Conservative Association of the county returning the member whose election was protested. In his statement of claim T. alleged that at a meeting of the association when it was determined to protest the return, a resolution was passed appointing him solicitor to carry on the proceedings, and that defendants retained and employed him as such solicitor. The defence to the action was that defendants never retained T. as alleged, but that he had volunteered to act as such, in the said proceedings without any remuneration. The action was tried without a jury and the trial judge found that there was no evidence of any resolution appointing T. solicitor, or of any retainer of T. by defendants as solicitor in said proceedings, and he gave judgment for the defendants. The Divisional Court reversed this judgment, holding that the retainer was proved; but the Court of Appeal, in turn, reversed the judgment of the Divisional Court and restored that of the trial judge. On appeal to the Supreme Court of Canada,

Held, affirming the judgment of the Court of Appeal, that the only matters in issue being matters of fact which were found in favor of defendants by the trial judge, who saw and heard the witnesses, and was the most competent person to decide these questions, and his judgment having been affirmed by the Court of Appeal, it should not be disturbed by this Court.

Appeal dismissed with costs.

F. E. Titus for the appellant.

Northrop for the respondent.

SUPREME COURT OF JUCICATURE FOR ONTARIO.

COURT OF APPEAL.

From C.P.D] [June 28.

ANDERSON *v.* CANADIAN PACIFIC RY. CO.

Railways—Destruction of luggage—Act of God—Limitation of action—R.S.C., c. 109, s. 27.

This was an appeal by the defendants from the judgment of the Common Pleas Division, reported 17 O.R., 747, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 15th of May, 1890.

The appeal was limited to two grounds : (1) That the accident was caused by the act of God, or *vis major* ; (2) that the defendants were protected by the limitation clause, R.S.C., c. 109, s. 27, the accident having taken place more than six months before action.

As to the first point the Court agreed with the Court below, and thought that the finding of the jury was fully justified by the evidence. Upon the second point the appellants also failed, BURTON and MACLENNAN, JJ.A., adhering to the opinion expressed by them in *McArthur* v. *The Northern and Pacific Junction Ry. Co.*, 17 O.R., 88, that the section was *ultra vires*, and HAGARTY, C.J.O., and OSLER, J.A., thinking that it did not apply to an action of contract, though not fully discussing the question, as such discussion was unnecessary.

Appeal dismissed with costs.

Robinson, Q.C., and *G. T. Blackstock*, for the appellants.

W. Nesbitt and *A. W. Aytoun-Finlay* for the respondent.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Ct.] [June 27.

BRIGGS *v.* SEMMENS.

Way—Severance of tenement by devise—Reasonable enjoyment of parts devised—Necessary rights of way.

Upon the severance of a tenement by devise into separate parts, not only do rights of way of strict necessity pass, but also rights of way necessary for the reasonable enjoyment of the parts devised, and which had been and were up to the time of the devise used by the owner o the entirety for the benefit of such parts.

Moss, Q.C., and *Lynch-Staunton*, for the plaintiff.

J. W. Nesbitt and *M. Malone* for the defendant McDonough.

McBrayne for defendant, Semmens.

Divisional Court.] [June 27

BLACK *v.* ONTARIO WHEEL CO.

Master and servant—Accident to servant—Fall of elevator—Negligence—Master's knowledge of defects—Want of reasonable care—Common law liability—Workmen's Compensation for Injuries Act—Factories Act, R. S. O., c. 208, s. 15, s-s. 4.

In an action by a workman against his employer to recover damages for injuries sustained owing to the falling of the cage of an elevator in the defendants' factory, the negligence charged was in the manner in which the heads of the bolts were held, and in the nature of the safety catch used upon the cage.

There was no evidence to show that the defendants were, or should have been, aware that the bolts were improperly sustained. They had employed a competent contractor to do this work for them only a few weeks before, and it was not shown that the alleged defect might readily have been discovered.

Held, that the defendants were not liable upon this head.

Murphy v. *Phillips*, 35 L. T. N. S., 477, distinguished.

The safety catch was made for the defendants by competent persons, and there was no evidence that it was not one which was ordinarily used.

Held, that the defendants were not liable on this head unless there was a want of reasonable care on their part in using the appliance which they used; and it was no evidence of such want of reasonable care merely to show that a safety catch of a different pattern was in use ten years ago by others, or even that it was at present in use, and that a witness thought it might have prevented the accident; and, as no negligence was shewn, the defendants were not liable either at common law or under the Workmen's Compensation for Injuries Act.

By s. 15, s-s. 4, of the Factories Act, R. S. O., c. 208, "All elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device, to be approved by the inspector, whereby the cab or car will be securely held in the event of an accident," etc.

There was no evidence to show whether this particular safety catch had been approved by the inspector.

Held, that the onus was upon the plaintiff to prove that the catch had not been approved; and if it had neither been approved nor disapproved, the question still was whether the catch used was of such a character and pattern as to make the use of it unreasonable.

Britton, Q.C., for the plaintiff.

E. D. Armour, Q.C., for the defendants.

Chancery Division.

Boyd, C.] [June 6.

STOTHART *v.* HILLIARD.

Easement—Prescriptive rights—Dominant and servient tenements—Rectory lands—Lease of servient tenement—Unity of possession—Suspension of easement—Joint owners of mill dam—Injunction—Damages.

In an action, begun in 1889, for an injunction to restrain two joint owners of a mill dam, having mill properties respectively on the east and west sides of a river, from damming back water against the plaintiff's land, and for damages, the defendants asserted an easement gained by prescription under R. S. O., c. 3, through user since 1838 and 1842. The plaintiff's land was patented in 1836 as glebe land appurtenant to a rectory, and the title vested in the rector and his successors as a corporation sole. In 1863 an Act was passed empowering the fee simple of this rectory land to be sold. The mill-owner on the west side of the river was in possession as lessee from 1866 till 1887 of the glebe land, which the plaintiff purchased in 1875, but did not get possession of till 1887.

Held, that no prescriptive right in the defendants to an easement over the plaintiff's land could have arisen prior to 1863, because the rector could not have alienated the fee, and an actual grant of the easement in perpetuity or in fee would have been invalid.

2. That the mill-owner on the west side had gained no prescriptive right since 1863, because between 1866 and 1887 there was such unity of possession in both dominant and servient tenements as caused a suspension of the easement.

3. That the mill-owner on the east side was not affected by the lease of the servient tenement, his user having been begun adversely, and the easement having been enjoyed by him as of right continuously and uninterruptedly for twenty years before action.

4. That the defendants being joint owners of the dam, the defendant on the east side was entitled to the supply of water as furnished by the existing dam all the way across the river, and therefore the plaintiff's remedy against the defendant on the west side was not an injunction, but damages

Moss, Q.C., and *R. E. Wood*, for plaintiff.

D. W. Dumble and *C. J. Leonard*, for defendant Hilliard.

Wallace Nesbitt and *R. M. Dennistoun* for defendants Auburn Woollen Co.

ROBERTSON, J.] [Aug. 11.

IN RE GING.

Building societies—R.S.O., c. 169, s. 47—"Obligation"—Moneys deposited upon savings bank account—Reasonable doubts—Petition—Costs.

A person died in the United States of America having moneys to his credit deposited upon savings bank account with two building societies doing business in Ontario, incorporated under R.S.O., c. 169. An administrator appointed by a Court in the foreign country applied to the building society to have the moneys transferred

to him, but the societies entertained doubts whether the words of s. 47 of R.S.O., c. 169, "share, bond, debenture, or obligation," applied to a savings bank account, and petitioned the Court under s. 49.

Held, that the word "obligation" covered the liability of the petitioners to repay the amounts deposited with them.

Held, also, that the doubts of the petitioners were reasonable, and they were entitled to costs.

Gibbons, Q.C., for petitioners.

Full Court.] [Sept. 4.

FINLAY *v.* MISCAMPBELL.

Master and servant—Workmen's Compensation for Injuries Act—Factories Act—R. S. O., c. 141—Ib. c. 208.

The plaintiff was employed by a sub-contractor to do work upon lumber after it had left the defendant's sawmill, and before it was shipped. The sub-contractor supplied water for the use of his men. The plaintiff, however, to get some fresher water to drink, went through the saw-mill (in which he had no business in connection with his work), and in returning, going out of his way through the mill, to assist a workman who was in difficulty with some planks, he fell into a hole in which a saw was working, and got injured.

Held, that under these circumstances, the plaintiff could have no claim against the defendants, either under the Ontario Factories Act, R. S. O., 1887, c. 208, or the Workmen's Compensation for Injuries Act, ib. c. 141.

Laidlaw, Q.C. and *Kerr*, for the plaintiff.

McCarthy, Q.C., and *Osler*, for the defendant.

Practice.

ARMOUR, C.J.] [June 26.

OUTWATER *v.* MULLETT.

Costs of the day—Postponement of trial—Counsel fees.

When the action came on for trial a postponement was applied for by the defendant, and was ordered upon payment of the costs of the day.

Held, that counsel fees were chargeable and taxable according to the discretion of the taxing officer, and not according to any arbitrary limit.

Hogg v. *Crabbe*, 12 P.R., 14, dissented from.

D. Armour for the plaintiff.

C. J. Holman for the defendant.

Maclennan, J. A.] [Sept. 8.

FOSTER *v.* EMORY.

Division Court appeal—Judgment for $100—Subsequent interest—R. S. O. c. 51, s. 148.

The "sum in dispute" upon an appeal from a Division Court, under R. S. O., c. 51, s. 148, is the sum for which judgment has been given in the Division Court.

Where judgment was given for $100,

Held, that subsequently accrued interest did not make the sum in dispute exceed $100.

A. C. Galt for the appellant.

Middleton for the respondent.

The Master in Ordinary] [June 2.

WANZER *v.* WOODS.

Domicile—Residence within Ontario—Rule 271 (c.)

The action was brought by a foreign company upon a contract made in a foreign country against two defendants, one of whom resided in Manitoba, and was there served with process. Upon a motion by this defendant to set aside the service it was contended by the plaintiffs that the other defendant was ordinarily resident or domiciled in Ontario, within the meaning of Rule 271 (c.), and therefore that the Court had jurisdiction.

It appeared that at the time of the motion the latter defendant was an employee of the government of the Province of Quebec; that prior to 1883 his domicile was in Quebec, whence he removed to Manitoba, where he resided till 1886; that he then went to Australia; that in 1887 or 1888 he returned to Canada, and resided part of the time in Toronto, and part of the time in Winnipeg, until September, 1889, when he returned to Quebec; that he remained while in Toronto for only three months at a time; that his wife had recently gone to

Europe and did not intend to return to Toronto; that his family were still in Toronto, but his intention was to keep them there only until he got something to do; that Toronto was never looked upon as a permanent home for the family; and that it was the intention of the family to go to him as soon as he should send for them.

Held, that he was neither domiciled nor ordinarily resident within Ontario; and the service was set aside.

W. M. Douglas for plaintiffs.

H. E. Ridley for defendant, J. H. Woods.

Mr. Dalton.] [Sept. 12.

HOLLISTER *v.* ANNABLE.

Discovery—Seduction—Examination of plaintiff's daughter.

The plaintiff in an action of seduction was examined for discovery by the defendant, but was able to give very little information.

Held, nevertheless, that the defendant was not entitled to examine the plaintiff's daughter.

The defendant having made an affidavit denying the seduction and all knowledge of it, an order was made for particulars of specific acts.

Turner v. *Kyle*, 2 C. L. T. 598; 18 C. L. J. 402, explained.

W. H. Blake for plaintiff.

Marsh, Q.C., for defendant.

Flotsam and Jetsam.

INSTRUCTOR (*at a law school*). What is an accommodation note?

STUDENT. One which the maker dosen't have to pay until he is ready to. (*Actual fact.*)

A NEGRO witness giving evidence in court was asked if he knew the reputation of a neighbor for honesty.

"I don' know nuffin ag'in him, Jedge," was the reply; "but if I war a chickun, I 'd roost high when he wuz hangin' round."

A CERTAIN Mr. F—— of the Western Circuit, conducting the defence of a woman charged with causing the death of her child by not giving it proper food, while addressing the jury, said: "Gentlemen, it appears to be impossible that the prisoner can have committed this crime. A mother guilty of such conduct to her own child! Why, it is repugnant to our better feelings;" and then being carried away by his own eloquence, he proceeded: "Gentlemen, the beasts of the field, *the birds of the air, suckle their young*, and—" But at this point the learned judge interrupted him and said: "Mr. F——, if you establish the latter part of your proposition, your client will be acquitted for a certainty."

A JUDGE in a neighboring State once intervened to prevent a waste of words. He was sitting in Chambers, and seeing, from the piles of papers in the lawyer's hands that the first case was likely to be hardly contested, he asked, "What is the amount in question?"

"Two dollars," said the plaintiff's counsel.

"I 'll pay it," said the judge, handing over the money; "call the next case."

He had not the patience of taciturn Sir William Grant, who, after listening for a couple of days to the arguments of counsel as to the construction of an act, quietly observed when they had done: "That act has been repealed."

THE following story is told of the chairman of the Bench of County Magistrates somewhere in the North. The gentleman in question, who was a large landed proprietor, had among his laborers a very useful man, who was somewhat of a favorite of his. This person had taken a fancy to some of his neighbor's fowls, was arrested and sent before his master for trial. Upon the case being called on, the prisoner, in answer to the charge, pleaded "Guilty." The chairman, nevertheless, went on trying the case, just as though the plea had involved a denial of the accusation. Knowing that the chairman was very deaf, a counsel present jumped up, and as *amicus curiæ*, ventured to interpose, and remind his lordship that the prisoner had confessed his guilt. Upon this the presiding genius flew into a tremendous passion, begged the learned counsel would not interrupt him, and exclaimed: "Pleaded guilty! I know he did; but you don't know him as well as I do. He 's one of the biggest liars in the neighborhood, and I wouldn't believe him on his oath." The trial proceeded; and while the result is not given, the probabilities are that the prisoner was acquitted.

Law Society of Upper Canada.

LAW SCHOOL—HILARY TERM, 1890.

LEGAL EDUCATION COMMITTEE.

CHARLES MOSS, Q.C., *Chairman.*

C. ROBINSON, Q.C. Z. A. LASH, Q.C.
JOHN HOSKIN, Q.C. J. H. MORRIS Q.C.
F. MACKELCAN, Q.C. J. H. FERGUSON, Q.C.
W. R. MEREDITH, Q.C. N. KINGSMILL, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers: E. D. ARMOUR, Q.C.
A. H. MARSH, B.A. LL.B. Q.C.
R. E. KINGSFORD, M.A. LL.B.
P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890 91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p.m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or

Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for Sept. 6th and 13th contain The American Silver Bubble, by Robert Giffen, and On the Rim of the Desert, *Nineteenth Century;* Hogarth's Tour, and the stronghold of the Sphakiotes, *Fortnightly;* Political and Social Life in Holland, *National;* Heligoland, the Island of Green, Red, and White, and Gueutch, *Blackwood;* Fish as Fathers, and in the matter of Dodson & Fogg, Gentlemen, *Cornhill;* The Novels of Wilkie Collins, *Temple Bar;* Amelia Opie, *Sunday Magazine;* Some Old Churches, *Gentleman's;* Scott's Heroines, *Macmillan's;* Ab-del-Kader's Favorite Resort, *Spectator;* The Englishman Abroad, *Globe;* with instalments of "Eight Days," "Old Lord Kilconnell," and "A Perilous Amour," and poetry. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

The Canada Law Journal.

VOL. XXVI. OCTOBER 16, 1890. No. 16.

IN our comments on *Jones* v. *Simes*, *ante* p. 327, we find we were in error in saying that there was no Ontario Rule similar to the English Rule 482. It appears that in the Consolidated Rules this omission was supplied by a new Rule, 680, which is in similar terms to the English Rule 482. Even before Rule 680 was passed, it appears that the Queen's Bench Divisional Court in *Stalker* v. *Dunwich*, 15 Ont., 342, held that, following the rule of equity, in the case of continuing damages they should be assessed down to the date of the assessment.

IT does not always follow that because a judge pronounces a certain view of the law on a particular subject to be "unquestionable" that it is really so. In 1870 Strong, V.C., considered it "beyond all question" law, that where a creditor writes a letter to his debtor requesting him to pay the amount of his indebtedness to a third party, such a letter is not a bill of exchange but a good equitable assignment of the debt: *vide Robertson* v. *Grant*, 3 Chy. Ch. R. 331; but twenty years later we have the Court of Appeal coming to a unanimous conclusion that such a letter is not an equitable assignment, but a bill of exchange, and, therefore, not enforceable against the debtor unless accepted by him: *Hall* v. *Prittie*, 17 Ont. App., 306. Such cases exhibit the difficulty a practitioner is often in, when called on to advise a client as to his legal rights.

WILLS AVOIDED BY MARRIAGE.

The first clause of section 20, R.S.O., chapter 109, is a dangerous pitfall, and should be fenced in and marked "Beware, Danger." A person on the eve of matrimony makes a will leaving all to the dear one who is soon to become so near; the marriage follows, and "amazement" is the end, as it is of the Anglican service, for the priestly benediction revokes the will. The wedding journey is begun, the railway collision comes, one—the testator—is taken, the other left; and the survivor finds that the very ceremony, the expectation of which was the reason why the dear departed made such a will, is the very cause of the revocation and destruction of the document, "and becomes the wictim o' connubiality, as Blue Beard's domestic chaplain said, with a tear of pity, ven he buried him."

Surely this was never intended. To revoke a will in any other way the *animus revocandi* must be present, but in the case we put the marriage is merely carrying out the intention in the mind of the testator when the will is made, and

yet "no declaration however explicit and earnest of the testator's wish that the will should continue in force after marriage will prevent revocation." Surely another exception should be inserted in this section allowing the validity of the will, or part of the will, made in favor of the intended husband or wife?

Under the law as it stands now where either of the twain made one flesh has any of this world's goods wherewith to endow the other, a solicitor should be in attendance at the wedding with his pen, ink and paper, and a will, or wills, should be drawn up, signed, published, declared and duly witnessed, before the happy couple leave the church, or even the minister's presence. Delays are dangerous, so it is not safe to wait until after the breakfast or even to kiss the bride.

Warter v. *Warter*, 15 Pro. Div. 152, is an example of how this section may work the ruin of one's hopes and wishes. Colonel DeGrey Warter, R.A., married Mrs. Taylor, in England, on February 3rd, 1880; on the sixth of the same month the Colonel executed a will by which he bequeathed all his property, real and personal, to the lady absolutely, whom he described as "my reputed wife." In the following year the parties went through a second form of marriage. The Colonel died in March, 1889, and when it came before him, the President of the Probate Division, being of the opinion that the marriage of February, 1880, was invalid, held that the will was revoked by the valid marriage of 1881. (See p. 486.)

There is also danger in and from this section in another direction. Although a will made before marriage is by law revoked by marriage, still there is little or no difficulty in obtaining probate of such a will in the Surrogate Courts. Neither the statute nor the rules require any evidence to be adduced to show the judge that the will propounded has not been annulled in this way; and where the testator is unknown to the judge or the solicitor, probate may, without hesitation be granted where it should not be. And what confusion and wrong may result can readily be imagined!

Should not the judges make rules to meet this point and require evidence as to marriage or no marriage, and the date of any marriage, before granting probate or letters with will annexed?

We feel sure that these two difficulties have but to be pointed out to the proper authorities (and of course these all study the pages of the LAW JOURNAL) to be at once remedied. R.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for September comprise 25 Q.B.D., pp. 325-420; 15 P. D., pp. 149-165; and 44 Chy.D., pp. 501-718.

MARITIME LAW—ACTION IN REM FOR WAGES EARNED IN PORT.

The Queen v. *Judge of London Court*, 25 Q.B.D., 339, was an application for a mandamus to the judge of an Admiralty Court to hear and determine an action; and the legal question involved was whether the mate of a vessel had, or

had not, a maritime lien on the vessel for wages earned by him for services rendered on her while she was in port, during unloading and reloading, and whilst in dock for repairs. The Court (Lord Coleridge, C.J., and Wills, J.) were of opinion, after consulting the judge of the Admiralty Court, that the lien existed, and the action would lie to enforce it.

BILL OF EXCHANGE—NEGOTIABLE INSTRUMENT—ALTERATION OF BILL BY ACCEPTOR—ACCEPTANCE "IN FAVOR OF DRAWER ONLY"—BILLS OF EXCHANGE ACT (45 & 46 VICT., C. 61) S.S. 8, 19, 36—(53 VICT., C. 33, S.S. 8, 17, 19, 36, (D.))

Decroix v. *Meyer*, 25 Q.B.D., 343, was as Lindley, L.J. describes it, "a case of some difficulty." The question to be decided was, however, a comparatively simple one. L. D. Flipo had drawn a bill of exchange on the defendants, payable to "order L. D. Flipo." The defendants accepted the bill "in favor of L. D. Flipo only, payable at the Alliance Bank, London," and struck out the word "order." Flipo indorsed the bill to the plaintiffs for value, and the question was simply whether or not the striking out the word "order" and the acceptance in the terms above mentioned had destroyed the negotiability of the instrument. Cave and A. L. Smith, JJ., were of opinion that the bill was not negotiable, but the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) were clear that the striking out the word "order" from the bill and the terms of the acceptance did not have that effect. They were of opinion that the acceptor had no right to strike out the word "order" from the bill, and that the effect of the statute (see 53 Vict., c. 33, s. 8, s.s. 4) was to put it in again; that the acceptor must *prima facie* be presumed to accept according to the tenor, and that an acceptance ought to be construed most strongly against the acceptor, and that here the acceptance did not in express terms vary the effect of the bill (see 53 Vict., c. 33, s. 19, (D)) because the addition of the words "payable at the Alliance Bank" were inconsistent with the idea that the bill was to be payable to Flipo only, though but for the latter words Bowen, L.J., appears to have thought that the acceptance would have had the effect contended for by the defendants.

PRINCIPAL AND AGENT—FRAUD—BRIBE TO AGENT—RECOVERY OF BRIBE FROM AGENT—ACTION AGAINST BRIBER.

The Mayor of Salford v. *Lever*, 25 Q.B.D., 363, was a case of a somewhat unusual character. The plaintiffs were a municipal corporation and proprietors of gas works, of which one Hunter was their manager, and he, in consideration of large bribes received from contractors, induced the plaintiffs to enter into contracts for the supply of coal at prices in excess of the market prices. The fraud having been discovered and an action brought against Hunter to compel him to account for the bribes he had received, he agreed to hand over securities to the amount of £10,000 subject to a proviso that the plaintiffs should proceed against the contractors who had given the bribes, and what they should fail to recover from them within a limited time should be made good out of the £10,000 and the balance thereof refunded to Hunter. £4,000 was recovered against other contractors, and the present action was brought to recover a sum

of over £2,000 after the time limited by the agreement with Hunter had expired. The defendants resisted the action on the ground that the plaintiff's claim was satisfied by the sum recovered from the other contractors, because under the agreement with Hunter they were now entitled to get the difference out of the £10,000 of securities handed over by him; that the plaintiff's claim was in respect of a conspiracy in which Hunter was a joint tort feasor, and that satisfaction by him discharged the defendants. But the Court though divided in their reasons for their decision, were yet unanimous in opinion that the agreement with Hunter was no discharge of the defendants. Denman and Charles, JJ., gave their decision on the ground that it was only a discharge of Hunter's liability to hand over the bribes he had received, and was not intended as a discharge of the tort he had committed jointly with the defendants; and Williams, J., on the other hand says that the agreement, though intended to discharge Hunter from both liabilities, was void as being *ultra vires* and contrary to public policy, because it, in effect, provided that he should retain the whole or some part of the bribes and that the amount of the bribes he retained should be proportioned to the effect of the evidence he gave. On the whole it may be said that though the decision is satisfactory from a moral, it is hardly so from a legal, point of view.

LIMITATIONS—SPECIAL CONTRACT FOR PAYMENT OF MONEY—CONDITIONS PRECEDENT TO CAUSE OF ACTION—ADMINISTRATOR—STATUTE OF LIMITATIONS (21, JAC. 1, C. 16) S. 3.

In *Atkinson* v. *The Bradford Building Society*, 25 Q.B.D., 377, the plaintiff sued as administrator of Thomas Atkinson to recover a loan made by Atkinson to the defendants, 21st March, 1877, with interest. The terms on which the money was advanced were contained in a book called the "Loan pass-book" which, among other things, provided that no money would be paid except on production of the investor's book, and he must either attend personally or send a written authority. In December, 1878, Atkinson gave notice of withdrawal, and was given by the defendants' secretary a form of withdrawal on which it was stated that the sum would be payable on the 14th January, 1879, between 10 a. m. and 5 p.m. or any subsequent day between those hours except Saturday, when the office closed at 1 p.m. Atkinson died on the 14th of January, 1879, but there was no evidence to show at what hour he died. On January 16th, 1879, some unknown person produced the pass-book and form of withdrawal which had been given to Atkinson, and fraudulently obtained the amount payable with interest to that date. The form of withdrawal was not signed, and there was no evidence that any of Atkinson's family knew of the withdrawal. On 3rd May, 1889, the plaintiff obtained letters of administration to Atkinson's estate and thereupon brought this action. The defendants relied on the Statute of Limitations (21 Jac. 1, c. 16). But the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.), were of opinion that the Statute was no bar, because the cause of action did not arise until the pass-book was produced by Atkinson himself, or by someone with his written authority, and this not having been done in

Atkinson's lifetime no cause of action arose before he died; and that even assuming that the debt was payable to Atkinson on the day of his death, yet there being no evidence that he died after the time fixed for payment, the Statute would not run against his administrator until letters of administration were taken out. Lopes, L.J., however, preferred to rest his decision solely on the former ground. As regards the latter point it may be observed that as regards realty the law in Ontario is modified by Statute (R.S.O. c. 3, s. 7) under which letters of administration for the purpose of the Statute of Limitations (R.S.O. c. 3) relate back to the death of the deceased.

INSURANCE—MARINE—COLLISION—PROXIMATE CAUSE OF DAMAGE.

Pink v. *Fleming*, 25 Q.B.D., 396, was an action to recover on a policy of marine insurance, whereby the defendants insured the plaintiff's cargo against damages occasioned thereto by collision. The vessel in which the cargo was being carried met with a collision; in consequence it had to put into port for repairs, and in order to carry out the repairs it became necessary to unload part of the goods insured, and on the completion of the repairs the goods were reshipped in the vessel, which proceeded on its voyage. On its arrival at its destination it was found that the goods, which consisted of fruit, had been damaged by the unloading and reloading, and the delay necessitated by the repairs. Under these circumstances it became necessary to determine whether the collision was the proximate cause of the loss. The Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.) affirmed the decision of Mathew, J., at the trial, that the collision was not the proximate cause of the loss, that the damage was too remote, and that therefore the action failed.

CONTRACT—CONFLICT OF LAWS—DISCHARGE OF DEBTOR BY FOREIGN BANKRUPTCY—EFFECT OF AN ENGLISH DEBT—STAY OF PROCEEDINGS UNDER JUDICATURE ACT 1873 (36 & 37 VICT., C. 66) S. 24, S.S. 5, (39)—(ONT. JUD. ACT) R.S.O., C. 44, S. 52, S.S. 10.)

In *Gibbs* v. *La Societe Industrielle, etc.*, 25 Q.B.D., 399, an attempt was made to induce the Court of Appeal to overrule the decision of Lord Kenyon in *Smith* v. *Buchanan*, 1 East 6. The action was brought against the defendants, a French Company, to enforce a contract made, and to be performed in England. Proceedings in liquidation had been taken in France to wind up the Company, and it was contended on the part of the defendants that in the first place the effect of those proceedings was to discharge the defendants from liability, and that in the second place, owing to the pendency of the proceedings in the foreign court, this action ought to be stayed under the Judicature Act *(see Ont. Act, s. 52, s.s. 10)*. But the Court (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) were agreed that even assuming the proceedings in France were equivalent to a discharge in bankruptcy in England, yet such discharge was inoperative as regards a debt due under a contract made and to be performed in England. And that such proceedings in the foreign court furnished no ground for staying the action either before or after judgment under the Judicature Act.

WEIGHTS AND MEASURES—SALE OF COAL—REPRESENTATION OF SERVANT NOT REPRESENTATION OF SELLER.

Roberts v. *Woodward*, 25 Q.B.D., 412, was a case stated by a magistrate. The proceeding was brought to recover penalties from the defendant on the ground that contrary to the provisions of a statute he had represented coal he was selling to the plaintiff to be of greater weight than it actually was. The evidence on which the claim was based showed that the coal in question was in a waggon in course of delivery, that it had been, under the provisions in the statute, stopped on the road and the servant in charge was required to state what weight of coal he carried. The coal was then weighed and found to be of considerably less weight; but it was held that the statement of the servant was not a representation of the seller, so as to make the latter answerable for penalties.

PROBATE—GRANT OF ADMINISTRATION OF PERSONALTY ON SUPPOSED INTESTACY.

In the Goods of Hornbuckle, 15 P.D., 149, establishes the rule that where a grant of administration has been made on an erroneous supposition that the testatrix's will only affected realty, probate will not be subsequently granted of the will until the letters of administration have been revoked.

PROBATE—WILL—REVOCATION BY MARRIAGE—DIVORCE—SUBSEQUENT PREMATURE MARRIAGE.

Warter v. *Warter*, 15 P.D., 152, is one of those cases which are constantly arising in which the effect of the Wills Act (R.S.O., c. 109) is found to defeat the presumably obvious intention of the testator. The testator, whose will was in question, had been a correspondent in a divorce case in which a divorce had been granted in India, where the statute law prohibited the re-marriage of the divorcees within six months of the final decree. The testator and the divorced wife came to England and were married within the six months. The testator then made his will by which he bequeathed all his property to his reputed wife. Apparently having doubts as to the validity of this marriage, the parties subsequently went through a second form of marriage; but, the will not having been republished, it was held by the President that the effect of the second marriage was to revoke the will; and that the first marriage was void under the Indian Statute, notwithstanding it was celebrated in England. (See p. 482 *ante*.)

PROBATE—WILL IN FORM OF DEED POLL—INTENTION—EXTRINSIC EVIDENCE.

In the goods of Slinn, 15 P.D., 156, extrinsic evidence was admitted to show that a deed poll, which purported to make a present gift of the grantor's property, was really intended by her as a will, and it was accordingly admitted to probate.

PUBLIC HOUSE—LEASE—RESTRICTIVE COVENANTS—COVENANT RUNNING WITH THE LAND—ASSIGNMENT OF PUBLIC HOUSE AND COVENANT.

Clegg v. *Hands*, 44 Chy.D., 503, is an important decision on the law of restrictive covenants, and was ably argued on the part of the defendant by Henn Collins, Q.C., who, according to Lindley, L.J., has studied this branch of the law probably more carefully than any body living. Several nice points were involved

in it. The material facts of the case were as follows: Clegg & Hands were brewers, carrying on business at Toxteth Park, and were owners of a public house, which they leased to the defendant, subject to a covenant that he should not, during the time, buy, sell, or dispose of, upon the premises any beer other than what should be purchased from the lessors, or either of them, either alone or jointly with any other person or persons who might thereafter enter into partnership with them, provided they should be willing to sell good beer at fair current prices; but the lease defined "lessors" to include their executors, administrators, and assignees. The lessors sold their business and good-will to their co-plaintiff, Cain, who carried on business at Liverpool, and the business at Toxteth Park was closed up. Cain and the lessors sued to enforce the covenant, and several points were raised on behalf of the defendants in answer to the claim. It was argued that the covenant obliged the lessees to buy beer only of the lessors or their partners or assigns, who should carry on business at Toxteth Park; that the covenant was a personal covenant incapable of assignment, and therefore did not run with the land, and that in any case Cain was not entitled to enforce it. But the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) decided against all these contentions, and held that where an affirmative covenant of this kind has a negative element in it, or the covenant is partly negative and partly affirmative, the Court in a proper case will enforce the negative covenant, and therefore the injunction granted by Bristowe, V.C., restraining the defendants from purchasing beer elsewhere than from Cain, contrary to the covenant, was properly granted.

MORTGAGE—SOLICITOR—MORTGAGEE—COSTS—PROFIT COSTS.

In *Field* v. *Hopkins*, 44 Chy.D., 524, a mortgage was made to two persons, one of whom was a solicitor, and the other an auctioneer. It contained a stipulation that the mortgagees should be "entitled to make the same charges and receive the same remuneration respectively for all business done by them respectively, in and about these presents, as they would have been entitled to make if they had not been mortgagees," and there was a covenant by the mortgagors to pay the mortgage debt, and "every other sum which may hereafter be advanced or paid by the mortgagees," or either of them. The mortgage money was advanced by the mortgagees as trustees, and prior to the mortgage, which was prepared by the solicitor-mortgagee, a valuation of the property was made by the auctioneer-mortgagee, on the instructions of the solicitor. Notwithstanding the stipulation and covenant above referred to, however, it was held by Kay, J., that the mortgagees could not in a foreclosure action charge against the mortgaged estate: (1) the costs of an order obtained by the solicitor on behalf of the mortgagors, subsequent to the mortgage, appointing trustees under the Settled Land Act, 1882, for the purpose of leasing part of the mortgaged property, (2) nor to costs incurred by one of the mortgagors to the solicitor-mortgagee, subsequent to the mortgage in matters unconnected with it; and (3) nor to a fee paid by the solicitor-mortgageer to the auctioneer-mortgagee for his valuation. This decision was affirmed by the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.). Kay, J., lays it down that a mortgagee cannot contract for the payment

of profit costs; but Cotton, L.J., says, "It may happen in some cases that there is a bargain between a mortgagee and a mortgagor that certain extra expenses shall be within the mortgage security," from which it might perhaps be inferred that in his opinion a contract for profit costs might be made.

COMPANY—MORTGAGE OF UNPAID CALLS.

In re Pyle Works, 44 Chy.D., 534, a company whose articles of association authorized the mortgaging of all or any of its assets, and also the unpaid calls on the stock, mortgaged the unpaid calls. Before the calls were made, the company was ordered to be wound up, and the question then arose whether the mortgagees were entitled to be paid out of the unpaid calls when collected by the liquidator, in priority to general creditors, and the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) held, affirming Stirling, J., that they were; Lopes, L.J., however, *dubitante* on the ground that previous decisions appeared to lay down the rule that in a liquidation all creditors must be paid *pari passu*, and that this right could not be qualified or derogated from by any antecedent contract.

WILL—CONSTRUCTION—GIFT TO PERSONS NAMED, FOR LIFE, AND TO THEIR CHILDREN—RESIDUARY GIFT TO "RELATIVES NAMED" WHO ARE ENTITLED TO A "TRANSMISSIBLE INTEREST"—WIFE'S NIECES—ILLEGITIMATE RELATIVES.

In re Jodrell, Jodrell v. *Seale*, 44 Chy.D., 590, the will of a testator who had left an estate of $1,000,000, came up for construction. By the will the testator had bequeathed certain legacies to persons whom he described as cousins, and to others as his nieces, and after their deaths to their children—and his residuary estate he directed to be equally divided among such of "his relatives thereinbefore named," as by virtue of the provisions of the will should become entitled to a vested transmissible interest in any part of his property. The persons described as the testator's nieces, were his wife's nieces, and not his own; and some of the persons described as cousins were illegitimate relatives. Upon this, two or three questions were raised: (1) What was meant by a "transmissible interest"? did it include the tenants for life? Stirling, J., held that it did not, and that only those took an interest in the residue, who took an interest under the prior clauses of the will, which would be transmissible to their representatives on their death. The other question was (2) Whether the illegitimate relations to whom transmissible interests had been given were entitled to share in the residue? Stirling, J., decided they were not; but on appeal the Court of Appeal (Lord Halsbury, C., and Lindley and Bowen, L.JJ.) reversed his decision on this point. A point was also made as to whether persons who had previously been described as children of persons named, were themselves to be treated as "before named" within the meaning of the will, and both Stirling, J., and the Court of Appeal were agreed that they were.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—CONTRACT BY LETTERS—SUBSEQUENT NEGOTIATIONS—WITHDRAWAL—TIME.

Bristol, Cardiff & S. Co. v. *Maggs*, 44 Chy.D., 616, is a case which shows that though a perfect contract may have been made by letters, for the sale and purchase

of land, yet where the purchaser subsequently presents a formal agreement for signature, which includes terms and stipulations not contained in the letters, and this is followed by a correspondence respecting the terms of the memorandum, which culminated in the vendors withdrawing their offer, the Court will not specifically enforce the contract contained in the letters, because the conduct of the purchasers had shown that the agreement was not complete, and that under the circumstances the vendors could withdraw from their offer, even within the time they had limited for its acceptance. In short, as Kay, J., says, (adopting the language of Cairns, L.C., in *Hussey* v. *Horne-Payne*, 4 App. Cas., 311), where a contract of this kind is sought to be made out by letters, you must look at all the correspondence that has passed, and cannot draw a line at any particular point and say, "We will look at the letters up to this point, and find in them a contract or not, but we will look at nothing beyond."

PROMISSORY NOTE, PAYABLE ON DEMAND, MATURITY OF—EXPRESS RENUNCIATION BY HOLDER—BILLS OF EXCHANGE ACT, 1882, SS. 62, S.S. 1, 89 (53 VICT., C. 33, S. 61, D.).

In re George, Francis v. *Bruce*, 44 Chy.D., 627, a nice point under the Bills of Exchange Act (53 Vict., c. 33, s. 61, s-s. 1 (D.)), came up before Chitty, J. The holder of a promissory note, payable on demand, which had been given by a relative to secure a loan, on his death-bed desired the note to be brought to him, that it might be destroyed, as he desired to forgive the maker of the note the debt. Search was made but the note could not be found, and the holder then directed his nurse to draw up a written memorandum to evidence his intention. She made a memorandum in writing stating that it was by the holder's dying wish that the cheque *(sic.)* for money lent to the maker of the note should be destroyed soon as found. This memorandum the nurse herself signed, but it was not signed by the holder. The note was discovered after the holder's death, and his executors applied to the Court for a decision of the question of law involved. On the part of the maker it was argued that a note payable on demand does not mature until demand is made, and, therefore, that it was a simple contract which, before breach, might be released by parol, and that what had taken place amounted to a parol renunciation; and, further, it was argued that the memorandum, made by the nurse, was a sufficient renunciation within the Bills of Exchange Act, s. 62, s-s. 1 (53 Vict., c. 33, s. 61, s-s. 1, D.). On the first point, Chitty, J., was of opinion that a note payable on demand, is at maturity the moment it is given; and, on the second point, he held that the memorandum was not a sufficient renunciation within the Act, and that a writing to satisfy the statute must be an actual renunciation in terms, and not merely expressive of a desire or intention to renounce at a future time. And this, apart from the question, whether in any case a memorandum signed by an agent would be sufficient, as to which he declined to express an opinion.

JOINT STOCK COMPANY—WINDING UP—BUSINESS NOT WARRANTED BY CHARTER—VACATING ORDER AFTER IT IS DRAWN UP, BUT BEFORE ENTRY.

In re Crown Bank, 44 Chy.D., 634, was an application by a shareholder to North, J., to wind up a company, on the ground that the company had ceased

to carry on the business for which it was formed, and was engaged in carrying on another business, not contemplated by the articles of association. The learned Judge held that it was just and convenient to grant the application, and so ordered. The order was accordingly drawn up and delivered out, but not passed or entered. Subsequently the petitioner and the respondents effected a compromise, and an application was made, on consent, to dismiss the petition, which was done, the order eventually issued containing a recital of the circumstances under which it was made. See *infra* p. 491 *In re Bristol Joint Stock Bank.*

CONTEMPT OF COURT—NEWSPAPER COMMENTS ON PENDING PROCEEDINGS—FINE.

In re Crown Bank, In re O'Malley, 44 Chy.D., 649, is a matter arising out of the preceding case, and is a decision of North on a motion to commit a newspaper publisher for contempt in publishing comments on the proceedings in that matter. These comments were instigated by the petitioning shareholder, and were to the effect that the "so-called bank" was "a fraudulent concern," and that the examination of the officers of the company would result in interesting revelations. For this the publisher was adjudged guilty of contempt of Court, and sentenced to pay a fine of £50 and costs. The case is also useful for reference as containing a form of the order made.

WILL—CONSTRUCTION—MARRIAGE WITH CONSENT OF TRUSTEE.

In re Smith, Keeling v. *Smith*, 44 Chy.D., 654, personal estate had been bequeathed to the testator's son, from and after his marriage, "with the consent of at least two of the trustees for the time being;" and the question was whether the consent to the marriage, which had taken place, had been duly given. The son, it appeared, had made a verbal request to the trustees for this consent, and they desired him to make his application in writing. He then applied in writing for their consent, and the trustees replied that they were prevented from taking any action, as they had been told the lady had declined his proposal. In this they appeared to have been mistaken, for the marriage took place, and, in the course of the proceedings to determine the question whether there had been a consent within the terms of the bequest, the trustees deposed that at the time of the son's verbal application they had no objection to the marriage, but were of opinion that it was not at that time desirable. Stirling, J., held that the consent had been substantially given within the principle of *Dorley* v. *Des Bouverie*, 2 Atk. 261.

PROPRIETARY CLUB—MEMBER HAVING NO RIGHT OF PROPERTY—EXPULSION—REGULARITY OF EXPULSION—INJUNCTION.

In *Baird* v. *Wells*, 44 Chy.D., 661, the regularity of certain proceedings, which resulted in the expulsion of the plaintiff from the Pelican Club, was called in question, and the plaintiff claimed an injunction to restrain the proprietor and secretary of the club from interfering with his use and enjoyment of the club. It appeared that the club was owned by the defendant, Wells, and that members had no rights of property in it, but merely the right to enjoy the privileges of the

club on paying an annual subscription. Stirling, J., therefore held that notwithstanding he found that the proceedings complained of were irregular, yet there being no rights of property involved, the Court could not interfere by way of injunction, and that the plaintiff's remedy was by action for damages.

INJUNCTION AGAINST USING NAME CALCULATED TO MISLEAD.

The decision of Stirling, J., in *Tussaud* v. *Tussaud*, 44 Chy.D., 678, is an important limitation of the general principle laid down in *Turton* v. *Turton*, 42 Chy.D., 144, that a man cannot be restrained from using his own name for the purpose of carrying on business—namely, that though he may carry on his own business under his own name, and may also sell to others such business and the right to use his name, and that though the business so carried on might be converted into a joint stock company, with the right to use the same name; yet that a man cannot, for valuable consideration or otherwise, confer on any other person the right to use his name in connection with a business which he has never carried on, and in which he has no interest whatever, or in which he is engaged only as a servant or manager, where such use would be calculated to mislead the public into confounding such business with any other prior existing business.

MINERALS WRONGFULLY TAKEN—ACCOUNT—INTEREST.

Phillips v. *Hornfray*, 44 Chy.D., 694, can hardly be considered as having any very direct bearing in this Province, owing to the difference which exists between our practice in the Master's Office and that which prevails in England. Indirectly, however, it is instructive as showing that where an account is directed against defendants for minerals, wrongfully taken by them, the action is not in the nature of an action of trover, but rather one for money had and received, and, therefore, not one to which the maxim *actio personalis moritur cum persona* applies; it was also held that where no adjudication has been asked at the hearing of the cause, on the question of interest, and the account had been taken without interest, interest could not be allowed on the hearing on further directions. Under our practice, however, the Master may take the account with interest, without any special direction, and where interest has not been allowed by the Master, this case would go to show that it could not be granted on further directions, but the question would have to be raised by way of appeal from his report.

COMPANY—RESERVE CAPITAL—WORKING CAPITAL EXHAUSTED—WINDING UP—R.S.O., C. 183, S. 5.

In re Bristol Joint Stock Bank, 44 Chy.D., 703, was an application by a shareholder to wind up a bank under the following circumstances: By the articles of association it was provided that a certain portion of its uncalled capital should not be called except for the purpose of winding up; with the exception of this part of the capital, all the rest except £337 had been exhausted. The company had been in existence for six years, but had never made any profit; it had originally commenced business on a large scale with a considerable staff, but its business was now carried on in small premises, by a single clerk. The petition was

supported by a considerable number, but not a majority, of shareholders. Kekewich, J., granted the application, on the ground that it was impossible to carry on the business with any reasonable hope of success, and in doing so he reviewed the cases in which the principles by which the Court is guided in winding up a company at the suit of a shareholder, are laid down. We may observe that the Winding Up Acts of the Dominion (R.S.C., c. 129), makes no provision for winding up companies at the suit of shareholders. Probably in such cases arising here resort would have to be had to the ordinary jurisdiction of the High Court, see *Harris* v. *Dry Dock*, 7 Gr., 450; the Provincial Act (R.S.O., c. 183) enables the Court to make a winding up order at the instance of a contributory when it is "just and equitable."

Notes on Exchanges and Legal Scrap Book.

CONFLICT OF LAWS.—An interesting point on the conflict of laws in cases of agency was decided by Mr. Justice Day, on the 2nd inst., in the case of *Chatenav* v. *Brazilian Submarine Telegraph Company, Limited* (notes, *ante* page 198). The point is an entirely new one, and raised the question whether a power of attorney given in a foreign county, but put in force in this country, is to be construed according to the law of the country where it was given, or according to the law of the country where it was put in force. Story in his work on the Conflict of Laws says that this point has never, so far as his researches extended, been directly decided either in America or any other country, so that there is no direct authority on the question. The case came before the court under the following circumstances: The plaintiff, who was resident and domiciled in Brazil, executed in Brazil a power of attorney whereby he empowered the attorney, a stockbroker in London, "specially to purchase and sell shares in public companies and public funds, receive the dividends as they may accrue due, and give receipts in conformity with his letters of orders." Armed with this authority, the attorney sold out certain shares which the plaintiff held in the defendant company, and the present action was brought to recover the shares or their value from the defendant company. The plaintiff's right so to recover, it was admitted, depended on the question whether, under the terms of the power, the agent had power to dispose of the shares without the plaintiff's consent, and this again depended on the question whether the document was to be construed, as to the powers conferred on the agent, according to the Brazilian or English law, for it was admitted that if construed according to English law the document would have given the attorney a more limited power than if construed according to Brazilian law. No doubt, if English law had given the agent a wider authority than the Brazilian law, it would have been contended, and would probably have been held, that persons dealing with the agent in England would have been entitled to rely on the wider authority given by English law, and that the foreign principal would have been stopped

from setting up the more limited authority as given by the law of his own country; but the present case was different, as it was a case where the English law gave the more limited authority, and there could not, therefore, be the same hardship upon persons dealing in England with the agent. Mr. Justice Day decided that the document was to be governed by English law, thus adopting the view of Story where he says (paragraph 286): "There is no doubt that where an authority is given to an agent to transact business for his principal in a foreign country it must be construed, in the absence of any counter proofs, that it is to be executed according to the law of the place where the business is to be transacted."—*London Law Times.*

CONVERSATION BY TELEPHONE.—The question of the admissibility in evidence of conversations over the telephone is one upon which there are already several decisions, and owing to the rapid increase of telephonic communication, is of some importance.

Conversations by telephone are like no other communications. For instance, they have been compared to communications made through an interpreter, but, of course, this is grossly inaccurate, for, in the case of a conversation carried on through an interpreter, whatever doubt there may be as to the meaning of the exact words used, there is none as to the identity of the speakers. Again, they have been compared to conversations between blind persons or between persons in neighboring rooms, not in sight of each other. This comes nearer to telephonic conversation, with the difference, however, that the voices of the speakers are not altered; as may be the case over the telephone.

While, however, there are obvious limitations to the reception in evidence of telephonic communications, their admission is in many cases necessary, and the law upon the subject may be considered as reasonably well settled.

The first case on the question, so far as we know, was *People* v. *Ward*, N. Y. (Oyer and Terminer, 1885, 3, N. Y. Crim. Rep., 483), where it was held that it is competent for a witness to testify to a conversation over the telephone, and to statements made by the other party thereto, where the witness called said party to the instrument and recognized his voice in response.

It is to be noted in this case that the instrument was a private telephone. The witness, Fish, testified: "I went to the telephone and rang up Mr. Ward. It was a direct telephone between Grant & Ward's office and the bank. I had conversed with the defendant, Ward, hundreds of times over the telephone, and could recognize his voice very distinctly. I recognized it on this occasion." This was held sufficient to admit testimony of what the defendant Ward said.

In the case of *Wolfe* v. *Missouri Pacific Ry. Co.* (97 Mo. 473; 10 Am. St. Rep. 331), the court went further, it being held that when a person places himself in connection with a telephone system through an instrument in his office, he thereby invites communications in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk, in charge of an ordinary shop, would be in

relation to the business then carried on, and the fact that the voice at the telephone was not identified does not render the conversation inadmissible.

But the Court properly added: "The ruling here announced is intended to determine really the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission. It may be entitled in each instance to much or little weight in the estimation of the triers of fact, according to their views of its credibility and of the other testimony in support or contradiction of it."

We have always felt doubtful as to whether the court did not go a little too far in this case. It is evident that a clerk in an ordinary shop, in apparent charge thereof, has a somewhat different authority to speak for his employer than an unknown person speaking over a telephone. In each case it is a question of presumptive evidence, but the presumption is very much stronger in the case of the clerk in the store than of the speaker over the telephone. The question as to where is the clerk is absolutely determined; as to where is the speaker over the telephone is only a matter of very great probability.

On the second point, that an identification of the voice of the speaker through the telephone is not necessary to make his declarations admissible, we think the court went to a very great extreme, and we doubt whether this ruling should be followed.

A rather curious case decided some years before the one last cited, (*Sullivan* v. *Kuykenhall* 82 Ky. 483; 56 Am. Rep., 901), was that of a conversation which took place, not directly between the parties over the telephone, but through the operator in charge of a public telephone station. It was held by a divided court that the person who received the message from the operator could state what was told him where there was evidence that the other party did in fact use the telephone at that time. It is evident that the operator could not be expected to remember the conversation. It would seem, however, that this case also goes pretty far, and that the statements of the party who alleges that he receives such a message should be strongly corroborated, at least as to the presence of the other party at the other end of the wire at the time testified.

In a recent case, *Banning* v. *Banning* (80 Cal. 271; 13 Am. St. Rep., 156), it was held that the fact that a married woman is not personally present before a notary at the time he takes her acknowledgment through a telephone, she being three or four miles from him, will not vitiate such deed, because, in the absence of fraud, accident or mistake, the certificate of the notary in due form is conclusive of the material facts therein stated.

In this case it was clearly proved that the acknowledgment was made through the telephone.

These appear to be all the decisions so far on the question.—*New York L. J.*

PET ANIMALS.—The keeping of pet animals has ever been a favorite habit of Englishmen. It manifests itself at an early age. Scarce has the boy assumed the dignity of knickerbockers than he begins to keep white mice, and becomes

the possessor of a hutch of rabbits or a cage of guinea-pigs. A little later he affects the company of a mastiff or a bull pup. Strange, too, are the animals of which pets are made. Tame tigers, lions, bears, foxes, elephants, are not unknown. Now, though an animal *feraæ naturæ* may be gentle and affectionate enough towards its master, it is not necessarily well disposed towards the whole human race; and the savage nature of many animals, though it can under certain circumstances be kept under restraint, is wont occasionally to break forth, and then that animal "runs amuck" and leaves ruin and desolation in its track. The question then arises, is its master liable for damage done by his pet under *all* circumstances, or only in certain cases? Shortly, does a man keep a pet animal at his risk? The answer to the question would appear to depend on the particular kind of animal kept.

The law on the point was clearly enunciated by Lord Esher in the recent case of *Filburn* v. *People's Palace Co.* (38 W.R., 706). "Animals," he said, "may be divided into two classes. The first class consists of those animals as to which, if a person chooses to keep one of them, he does so at his peril, and it is not necessary or material to prove that he knew the particular animal he keeps to be dangerous. The other class consists of animals which are not, as a class, of a dangerous nature, though particular individuals of that class may become dangerous. If a person keeps an animal of this class he is not liable for injury done by it unless he knew that the particular animal was dangerous. How can one determine to which of these two classes any particular kind of animal belongs? Some animals are known by everybody not to be of a dangerous nature in any country. The law accordingly recognizes that such animals are not dangerous. There is another division of animals which the law recognizes as not being of a dangerous nature in England. For instance, there are horses, oxen, dogs, and others which I do not pretend to enumerate. These have come to be recognized by the law as not being of a dangerous nature in England in this way: Though originally wild, in the course of years the whole race has been so tamed in this country that their progeny in England is now known and recognized as not being of a dangerous nature. On account of that universal knowledge, the law in this country recognizes and assumes that these animals as a race are not dangerous in England. Unless an animal can be brought within one of these two divisions —namely, a race of animals that is not dangerous anywhere, or a race of animals which by cultivation, so to speak, in England is recognized as not being dangerous in England—it falls within the first class, and if kept by anyone it must be kept at his peril."

Such, then, is the legal classification of animals. Let us now examine the cases on the subject. First of all let us take the cases which fall within the first class: *i.e.*, of animals so innately dangerous that he who keeps them, keeps them at his risk. There are not many reported decisions in point. It may be taken for granted without express decisions to that effect, that a man who indulges in the luxury of such pets as lions, tigers, wolves, *et id genus omne*, must do so at his risk. The reported cases only deal with bears, monkeys, and elephants.

As to bears: *Besozzi* v. *Harris* (1 F. & F. 93) was a case of a bear, which its owner kept chained up. The plaintiff was walking past, and was seized by the

bear and seriously injured. The bear was proved to be always tame and docile in its habits. But judgment was given for the plaintiff on the ground that he who keeps an animal of a fierce nature is bound so to keep it that it shall not commit an injury, and when such an animal does damage, the owner is liable, though it be shown it never had evinced any fierceness. Crowder, J., said, "Everybody must know that such animals as lions and bears are of a savage nature. For though such nature may sleep for a time, this case shows that it may wake up at any time." It was held, however, that evidence of the bear's gentle disposition was admissible in reduction of damages.

As to monkeys: One of the earliest cases on the subject is, perhaps, *Andrew Baker's case*, alluded to by Hale, where the owner of a monkey, which got loose, was held liable for injuries inflicted by it on a child. Hale himself says (1 P.C. 430): "If the beast which does the damage is *ferœ naturœ*, as a lion, a bear, a wolf—yea, an ape or a monkey—if he get loose and do harm to any person, the owner is liable, though he have no particular notice that he did any such thing before; and in case of such a wild beast, or in case of a bull or cow, that doth damage where the owner knows of it, he must at his peril keep him up safe from doing hurt; for though he use diligence to keep him up, if he escape and do harm the owner is liable to answer in damages." And in the leading case of *May* v. *Burdett*, another monkey case, the owner was held liable, for Denman, C.J., said, "Whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable to any person attacked and injured by the animal, without any averment of negligence or default in securing or taking care of it." "The gist of the action is the keeping of the animal after knowledge of its mischievous propensities."

Elephants formed the subject of the case previously mentioned, *Filburn* v. *People's Palace Co.* There, an elephant which was being exhibited, got loose, and attacked the plaintiff. The Court of Appeal held that an elephant came under the first class, and was kept at the owner's risk. Lord Esher said: "It is clear elephants cannot come under the division of animals not dangerous anywhere. Nor can it be said that elephants have through a long series of years been born and tamed in this country, that their progeny has been recognized in England as not dangerous. Therefore the race is not brought within the second class above mentioned. Accordingly elephants fall within the first class, and whoever keeps an elephant must do so at his peril, and must prevent it from doing any injury; and his knowledge of the dangerous or mischievous character of the particular elephant that he keeps is immaterial. The cases of animals falling within the second class have mostly to do with dogs; but we have one or two other cases in which the injuries were effected by other animals. With reference to this second class, the owner is not liable unless he can be fixed with knowledge that the particular animal which did the injury was of a savage disposition."

Jackson v. *Smithson* (15 M. & W. 563), was a case heard in 1846. There a ram ran at and butted the plaintiff, and it was held he could recover without showing that the defendant *negligently* kept the ram so long as *scienter* was averred. Platt, B., said, "No doubt a man has a right to keep an animal which is *ferœ naturæ*,

and nobody has a right to interfere with him in doing so until some mischief happens; but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible." The Baron must be conceived to be talking of animals which the law does not regard as innately and unsubduably mischievous.

In *Cox* v. *Burbidge* (11 W. R. 435), a child was kicked by a horse whose owner had negligently allowed it to stray on the highway. The owner was held not liable, on the ground that (the injury not being sufficiently closely connected with negligence, and negligence therefore being out of the question) a horse is an animal *mansuetæ naturæ*, and there was no evidence that the owner knew of any propensity to kick or liability to stray. Willes, J., said, "The distinction in the rule between fierce and tame animals is clear. In the former case the owner must take care to keep it under his control, and if he does not do so he is answerable for the mischief it does, unless it is of a wild nature and has returned to the woods. As to an animal of tame nature, he is not liable unless it be shown he knew of its mischievous habits." Again, in *Jackson* v. *Smithson* (15 M. & W. 563), Alderson, B., said there was no distinction between the case of an animal which breaks through the tameness of its nature and is fierce, and known by the owner to be so, and one which is *feræ naturæ*.

Coming now to dogs. It was Lord Cockburn who said that "every dog was entitled to at least one bite." His lordship's statement is, however, not good law. In *Worth* v. *Gilling* (2 C. P. 1) it was distinctly laid down that to make the owner liable it was not necessary to show that the dog had ever before bitten anyone. It was sufficient to show that the dog was ferocious, and that the defendant knew it was.

A very old case on dog bites is *Mason* v. *Keeling* (12 Mod. 332). There the plaintiff was bitten by the defendant's dog while "peaceably going about his business" in the street. The judgment of Holt, J., is worth perusing for its quaint style. "If it had been said that the defendant knew the dog to be *ferox* I should think it enough. The difference is between things in which the party has a valuable property, for he shall answer for all damage done by them; but of things in which he has no valuable property, if they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature there must be notice of the ill quality; and the law takes notice that a dog is not of a fierce nature, but rather the contrary, and the presumption is against the plaintiff; for can it be imagined that a man would keep a fierce dog in his family willingly. . . . Nor does it appear here, but it was an accidental fierceness. Or suppose it were an innate one to this dog particularly, and it had been given to the owner but an hour before, shall he take notice of all the qualities of his dog at his peril, or shall he have his action against the giver for bestowing him a naughty dog? In case a dog bites pigs, which almost all dogs will do, a *scienter* is necessary. And I do not doubt but if it be generally laid that a dog was used to bite *animalia*, and the defendant knew of it, it will be enough to charge him for biting of sheep, etc.; and by *animalia* shall not be intended frogs or mice, but such in which the

plaintiff has property." Judgment was given for the defendant. This case then decided, in the language of the headnote, that it was not sufficient to plead that the dog was a "mongrel mastiff, *valde ferox* and not muzzled, and that he *furiose et violenter impetivit et graviter momordit et vulneravit* the plaintiff."

Another old case is *Jenkins* v. *Turner* (1 Ld. Ray. 109). There it was held that if a man keeps an animal after it has within his knowledge done any mischief, if it afterwards does any other mischief, though of a different kind, an action will lie against him. In this case it was argued that if a man keeps a dog which bites a mare, and notwithstanding notice thereof he still keeps the dog, and the dog afterwards bites a man, the owner would not be liable. But the Court held that if the owner of a dog knows that it is mischievous he ought to destroy it, or prevent it doing any more hurt. So that it does not seem necessary to prove that the owner of a dog, which has bitten the plaintiff, knew that the dog had bitten other human beings before. It is sufficient if the owner knew it had a propensity to bite *animalia*, such *animalia* at least as are not *feræ naturæ*, or not such as it is the very nature even of the most well-behaved dogs to bite, *e.g.*, rats, cats, rabbits, etc.

A question arises, must there be proved, in addition to *scienter* of the defendant, negligence on his part in allowing the animal to escape and do damage? This seems to be settled in the negative by *May* v. *Burdett* (9 Q. B. 301). Lord Denman there said: "A person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and if it does mischief, *negligence* is *presumed* without express averment. The negligence is in keeping such an animal after notice. As was said by counsel for the plaintiff, 'The *scienter*, not negligence in keeping, constitutes the tort.' And Comyns observes, 'It is sufficient to plead, *Canem ad mordendum consuetum scienter retinuit.*'"

As to what amounts to proof of the knowledge by the owner of the mischievous propensities of the animal he keeps, there have been several cases. Thus a report that a dog had been before bitten by a mad dog is evidence that the owner knew the dog to be mischievous. (*Jones* v. *Perry*, 2 Esp. 482.) It is sufficient to prove that the owner had warned people to beware of the dog, lest they should be bitten. (*Judge* v. *Cox*, 1 Stark 285.) And where a bull gored a man who was wearing a red neckerchief, it was held sufficient evidence of the bull-owner's *scienter* of the bull's disposition that he had stated that he knew the bull would run at anything red. (*Hudson* v. *Roberts*, 6 Ex. 679.) But it is not sufficient merely to show that the dog was of a bad disposition and was usually kept chained up (*Beck* v. *Dyson*), nor that the dog had once bitten cattle. (*Thomas* v. *Morgan*, 2 C. M. & R. 496). And the fact that the defendant had offered to compensate a man bitten by his dog, is only very slight evidence that he has a guilty conscience, and knew the dog was savage. (*Thomas* v. *Morgan*, and see *Beck* v. *Dyson*.) The dog may be brought into Court so that the jury may judge for themselves of its temper and disposition. (*Line* v. *Taylor*, 3 F. & F. 731.)

As a general rule the knowledge of a servant of the owner of the dog that it is savage is knowledge on the part of the owner himself, if the servant were appointed to keep the dog. (*Baldwin* v. *Castle*, L. R. 7 Ex. 325.) But in other cases it must

be shown, if the dog is usually in charge of other persons than the owner and those persons knew of its ferocity, that that knowledge was transmitted to the owner. (See *Applebee* v. *Percy*, L. R. 9 C. P. 647.)

Notice to the wife of the savage nature of the dog will be sufficient evidence of the *scienter* to fix the husband (*Gladman* v. *Johnson*, 36 L. J. C. P. 153); but the converse case does not seem to hold good. (*Miller* v. *Kimbray*, 16 L. T. 360.)

Under some circumstances a person bitten by a fierce dog is not entitled to damages, though he can fix the owner with *scienter*. For no action lies for an injury arising from the defendant letting loose a dog in his own premises for their protection at night (*Brock* v. *Copeland*, 1 Esp. 203); and if the owner of a dog keeps him properly secured, but another person improperly lets him loose, and urges him to mischief, the owner is not liable. (*Fleming* v. *Orr*, 1 W. R. 339.) Again, a party who is bitten by a dog in consequence of being himself on the owner's land, on which he is not entitled to go, cannot sue for injury done him by the dog. (*Sarch* v. *Blackburn*, 4 C. & P. 267.) As to persons rightly on the land of the owner, a mere notice, "Beware of the dog!" will not protect the dog's owner from liability if the person injured could not read, or did not see the notice. (*Ibid;* see also *Curtis* v. *Mills*, 5 C. & P. 489.)

Lastly, it may be remarked that it is not essential that the defendant should be the owner of the dog, for if he harbors the dog, or allows it to resort to his premises, that is sufficient to make him liable for injury done by it. (*McKone* v. *Wood*, 5 C. & P. 1.) We may mention that we have excluded from this article the cases of injury done by dogs to sheep and cattle, including horses, which are regulated by the statute 28 & 29 Vict., c. 60, and in respect of which the owner is responsible, although there is an absence of *scienter* on his part.—*Law Notes.*

Reviews and Notices of Books.

History of the Court of Chancery, and of the Rise and Development of the Doctrines of Equity.—By A. H. Marsh, Q.C. Toronto: Carswell & Co.

This little work depicts the struggle between the Common Law and Equity; and the author has clothed the otherwise dry details, necessary to such a history, with an interest originally intended to be manifested in his lectures before the Law School.

We are carried along a connected chain, link by link, to the present time, from the days of the Curia Regis, whose component parts are now represented by the Privy Council, House of Lords, and House of Commons, as well as the several Benches of judges. On these links we find in succession the Chief Justicier—an Administrator of Justice during the then ofttime absence of the sovereign—; the Chancellor—"the keeper of the king's conscience"—; the rise of the Chancellor's power, first acquired by obtaining Common Law Jurisdiction; the failure of the Statute of Westminster the Second (*in consimili casu*), by which it was sought to adapt the existing writs to the exigencies of each case arising; the popularity of the Chancery, on account of the absence of fines; but, on the other hand, the abuse of the procedure by vexatious suits. Following this, we find many interesting instances of the conflict between the Chancery and the Common Law, notably that between Lord Coke and Lord Ellesmere, the Court of Exchequer—exercising as it did, a certain equity jurisdiction—being especially jealous of the Court of Chancery. An interesting account is given of the form of pleadings, originally commenced by a petition addressed to the Chancellor, without the preliminary issue of a writ. Verbose pleadings, even at that early date, did not find favor, for we are told that a replication of six score sheets was reckoned to be above five score too many, and the offender, with the replication hung around his neck, was led through the courts of Westminster, and, in addition, heavily fined. Such an example as this in the present day could not fail to lighten the burdens of our taxing officers. The author shows how the judges were first paid by fees and afterwards by salary, now, indeed—in Ontario—far too inadequate.

The extraordinary discretion, over-riding the law of the land, which was allowed to the Chancellors, to the intense disgust of the Common Law jurists, is thus tersely referred to by Lord Mansfield, in *Reg.* v. *Wilkes*. "Discretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humor. It must not be arbitrary, vague, and fanciful, but legal and regular." A book such as this one, on perusal, shows itself to be, cannot fail to be of benefit to, nay almost a requisite for, the student —and we are all students—as well as entertaining to the general reader.

DIARY FOR OCTOBER.

1. Wed.....County Court Non-Jury Sittings except in York. William D. Powell, 5th C.J. of Q. B., 1816.
5. Sun.....*18th Sunday after Trinity.*
6. Mon.....County Court Sittings for Motions, except in York.
7. Tues....Henry Alcock, 3rd C.J. of Q.B., 1802. R. A. Harrison, 11th C.J. of Q.B., 1875.
8. Wed.....Sir W. B. Richards, C.J. Sup. Ct., 1875.
11. Sat.....County Court Sittings for Motions, except in York, end. Columbus discovered America 1492.
12. Sun.....*19th Sunday after Trinity.* Battle of Queenston, 1812.
13. Mon.....County Court Sittings for Motions in York begin. Sur. Ct. Sittings
15. Wed.....English law introduced into Upper Canada, 1791.
18. Sat.....St. Luke. County Court Sittings for Motions in York end.
19. Sun.....*20th Sunday after Trinity.*
20. Mon.....County Court Non-Jury Sittings in York. Last day for Law Society notices.
21. Tues.....Battle of Trafalgar, 1805.
22. Wed.....Supreme Court of Canada sits.
23. Thur....Lord Lansdowne, Governor-General, 1883.
24. Fri.....Sir. J. H. Craig, Governor-General, 1807.
26. Sun.....*21st Sunday after Trinity.*
27. Mon.....Hon. C. S. Patterson, app. Judge of Sup. Ct., 1888. Jas. Maclennan, app. Judge of Ct. of Appeal, 1888.
28. Tues.....Supreme Courts sits. St. Simon and St. Jude.
29. Wed.....Battle of Fort Erie, 1813.
31. Fri .....All Hallows' Eve.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

STREET, J.] [Aug 29.

IN RE MITCHELL *v.* SCRIBNER.

Prohibition—Division Court—Order of Judge setting aside attachment—R.S.O., c. 51, s. 262.

Power over the process of his own court is inherent in the judge of a Division Court as well as of other courts; and, notwithstanding the provisions of s. 262 of the Division Courts Act, R.S.O., c. 51, a judge may set aside an attachment which has been improperly issued.

Douglas Armour for plaintiff.

Swabey for defendants.

Chancery Division.

FERGUSON, J.] [Sept. 4.

ATTORNEY-GENERAL FOR CANADA *v.* CITY OF TORONTO.

Municipal Corporations—By-law as to payment of water-rates—Discount to consumers—Exception as to Government institutions—Taxes—Discrimination.

A by-law of the defendants relating to the payment of rates for water supplied by the defendants to buildings in the municipality, provided that the rates should be subject to a reduction of fifty per cent., if paid within a certain time, "save and except in the cases of Government and other institutions which are exempt from city taxes, in which cases the said provisions as to discount shall not apply."

Held, that the post-office, customs-house, and other buildings vested in the Crown, all of which are exempt from city taxes, were "Government institutions" within the meaning of the by-law.

(2) Having regard to 35 Vict., c. 79, s. 12 (O.); 41 Vict., c. 41, s. 3 (O.); R.S.O., c. 192, ss. 19, 28, that the moneys charged and paid as water-rates, or rent for water, were not taxes, but the price or prices paid for water upon a sale thereof to the consumers.

(3) That the by-law was not invalid as discriminating against the Crown.

James Reeve, Q.C., and *Wickham*, for the plaintiff.

C. R. W. Biggar, Q.C., for the defendants.

MacMahon, J.] [July 21.

TOWN OF MEAFORD *v.* LANG.

Principal and surety—Non-disclosure by creditor—Official bond—Release of surety.

Where in an action brought against sureties to a tax-collector's bond, the said bonds being for the due payment over of taxes collected in 1886 and 1887, it appeared that the plaintiff's corporation, though they knew that the collector had, for some years, a loose way of doing his business, and was dilatory in making his returns, yet had not had it brought home to them that he was actually dishonest, and that they had not informed the defendants, when obtaining the execution of the bonds by the latter, of their causes of complaint against the collector; but it did not appear that they had dealt fraudulently with the defendants:

Held, that the non-disclosure by the plaintiffs to the defendants of the past conduct of the collector, did not relieve the defendants from their obligation under the bonds.

Cassels, Q.C., for the plaintiffs.

Kerr, Q.C., for the defendants.

Common Pleas Division.

Div'l Court.] [June 27.

REGINA *v.* SMITH.

Criminal law—Separate indictments for abduction and seduction.

The prisoner was convicted under R.S.C., c. 162, s. 44, the Act relating to offences against the person, for unlawfully taking an unmarried girl, under the age of sixteen years, out of the possession and against the will of her father. On the same day the prisoner was again tried and convicted under R.S.C., c. 157, s. 3, the Act relating to offences against public morals, for the seduction of the said girl, she being of previously chaste character, and between the ages of twelve and sixteen years.

Held, that the offences were several and distinct, and so a conviction on the first indictment did not preclude a conviction on the second one.

A. H. Dymond for the Crown.

No one appeared for the prisoner.

REGINA *v.* WATSON.

Public Health Act—R.S.O., c. 205—Owner or agent, meaning of—Plumber.

By the 6th clause of a city by-law, passed under the Public Health Act, R.S.O., c. 205, it was provided that before proceeding to construct, re-construct, or alter any portion of the drainage, ventilation, or water system of a dwelling, house, etc., "the owner or his agent constructing the same" should file, in the city engineer's office, an application for a permit therefor, which should be accompanied with a specification thereof, etc.; and by the 8th clause, that after such approval of such plan or specification, no alteration or deviation therefrom would be allowed except on the application of the "owner or of the agent of the owner" to the city engineer. By s. 2 of the said Public Health Act, "owner" is defined as meaning the person for the time being receiving the rents of the lands on his own account, or as agent or trustee of any other person who would so receive the same if such lands and premises were let.

Held, that the agent intended by the Act, and coming within the terms of the by-law, meant a person acting for the owner as trustee or in some such capacity, etc., and did not include a plumber employed by the owner to re-construct the plumbing in his dwelling-house.

T. W. Howard for the applicant.

F. Mowat, contra.

REGINA *v.* DOWSLAY.

Transient traders—Proof of by-law—R.S.O., c. 184, s. 289.

On the trial of a charge of being a transient trader without a license, contrary to a municipal by-law, no copy certified by the clerk to be a true copy and under the corporate seal as required by s. 289 of R.S.O., c. 184, was produced, but merely a by-law stated by the solicitor for the complainant to be the original by-law.

Held, that the requirements of s. 289 were not complied with, and the by-law was quashed with costs.

Aylesworth, Q.C., for the applicant.

Marsh, Q.C, contra.

BAKER *v.* FISHER.

Sale of goods—Intention of purchaser to set off a claim against the vendor—Fraud.

The plaintiff, with the intention of parting with the possession and property in certain flour, made an absolute sale of same, on apparently a short term of credit, to the defendant, who withheld from the plaintiff his intention to pay for the flour by setting off a claim he had acquired against the plaintiff.

Held, that this did not constitute a fraud on the defendant's part so as to entitle the plaintiff to disaffirm the contract and replevy the goods.

Smythe, Q.C., for the plaintiff.

Machar for the defendant.

REGINA *v.* ATKINSON.

Police magistrate—Appointment of—Legality of—Canada Temperance Act.

On the 24th June, 1879, F. was appointed police magistrate for the town of W., in the county of O., and on the 12th January, 1887, H. for the county of O., in the place of one P., deceased. It did not appear whether F. or P. was the prior appointee. It was urged that H.'s appointment for the whole county was illegal by reason of F.'s previous appointment for W., and a conviction made by him for an offence against the Canada Temperance Act, committed in the county of O., but outside of the limits of W., was therefore bad,

Held, that under R.S.O., c. 72, ss. 8, 11, 12, H.'s appointment was legal, and therefore the conviction made by him, good.

Regina v. *Atkinson*, 15 O.R., 110, commented on.

Du Vernet for the motion.

Delamere, Q.C., contra.

REGINA *v.* LYNCH.

Justices of the Peace—Absence of police magistrate—Trial of offence under R.S.C., c. 157—Alternative punishment—Imprisonment for more than three months—R.S.C., c. 178.

By s-s. 2 of s. 8 of the R.S.C., c. 157, any loose, idle, or disorderly person or vagrant shall, upon summary conviction before two justices of the peace, be deemed guilty of a misdemeanour, and liable to a fine not exceeding $50, or to imprisonment not exceeding six months, or both. By s. 62, of R.S.C., c. 178, the justices of the peace are authorized to issue a distress warrant for enforcing payment of a fine, and if issued to detain the defendant in custody, under s. 62, until its return; and if the return is no sufficient distress, then, under s. 67, to imprison for three months.

B. and R.J.F., two justices of the peace for the city of Toronto, in the absence of the police magistrate for the said city, convicted the defendant for an offence under said Act, and imposed a fine of $50, and in default of payment forthwith directed imprisonment for six months unless the fine was sooner paid.

Held, that under the said sub-section the justices had jurisdiction to adjudicate in the matter; and that it was not necessary to consider the effect of an agreement entered into between the police magistrate and B., to assist him in the trial of offences.

Held, also, that the conviction was bad, for under c. 157, there was no power to award imprisonment as an alternative remedy for non-payment of the fine, while under R.S.C., c. 178, imprisonment in the alternative can only be awarded after a distress has been directed and default therein; and, furthermore, the imprisonment in such case can only be for three months.

Du Vernet for the applicant.

Dymond for the Attorney-General.

Curry for the magistrates.

LAWSON *v.* CORPORATION OF ALLISTON.

Municipal corporations—Obstruction on highway by derrick—Digging well under sec. 489—Negligence—Contributory negligence.

The defendants, for the purpose of sinking a well in one of the public streets of the village to procure water for public purposes, under the power conferred by section 489 of the Municipal Act, had erected a derrick in the said street. The plaintiff had driven into the village past the said derrick without its appearing to affect the horse, the derrick not then being at work, but on attempting to pass it on her way home, while the derrick was at work, the horse took fright, ran away, and threw the plaintiff out of the carriage, causing her to sustain a severe injury. It was found that the derrick was of a nature to frighten horses, and that the defendant had not taken proper precautions to guard against accidents, and that there was no contributory negligence on the plaintiff's part.

Held, that the defendants were liable for the injury sustained by the plaintiff; but as the court considered the damages excessive, a new trial was directed unless the plaintiff consented to a reduction of same.

J. A. McCarthy for the plaintiff.

Lount, Q.C., for the defendants.

ATTORNEY-GENERAL EX REL HOBBS *v.* NIAGARA FALLS WESLEY PARK CO.

Street railway—Operating on Sunday—Right to restrain.

The defendants, by letter patents issued under the Street Railway Act, R.S.O. c. 171, were authorized to build and operate (on all days except Sundays) a street railway in the town of Niagara Falls, and on an information to restrain the defendants operating the railway on Sunday,

Held, ROSE, J., dissenting, that the information would not lie, for no private right or right of property was involved, nor any injury of a public nature done, and the interference of the court would not be exercised merely to enforce performance of a moral duty.

W. M. Douglas for the plaintiffs.

Hill, contra.

HOWARTH *v.* KILGOUR.

Defamation — Publication on privilegea occasion—Malice.

The plaintiff and one S. had been in partnership, S. having retired from the firm and left the country. Subsequently the plaintiff made an assignment for the benefit of his creditors. The defendant was a creditor and was appointed one of the inspectors of the estate. S. wrote a letter to one F. relative to the plaintiff's business, which the plaintiff claimed to be libellous, which F. forwarded to the defendant, who showed it to his co-inspector, to another creditor, and to the plaintiff's late book-keeper. In an action against the defendant for the publication,

Held, that the occasion of the publication was privileged, the letter being only shown to persons equally interested with the defendant in the matter, and being so privileged the onus was on the plaintiff to show malice, if any.

Denovan for the plaintiff.

Wallace Nesbitt and *J. R. Roaf*, contra.

BRYDGES *v.* HAMILTON ROLLING MILLS CO.

Master and servant—Accident – Workmen's Compensation for Injuries Act — Defect in machine—Contributory negligence.

A bolt was used for holding the lower blade of a pair of shears to an iron block called the bed plate, some eight inches thick, upon which the iron or steel to be cut was put, and along the face thereof, where the workman stood, there was a guard about three inches high, under which the iron was put to be cut by the shears, the only danger being when the iron became too short to cause the guard to be any protection. The bolt was too long, projecting outwards about 4½ inches, but there was no evidence to show that it was insufficient for the purpose for which it was used, nor likely to cause injury by reason of its length. The plaintiff, who had previously seen others working at the machine, was put to work at it himself, and had worked at it several times prior to the accident without any injury or apparent fear of any. When the accident happened he was feeding the machine with scrap iron, and a piece becoming too short to hold outside the guard, he held it down by another piece, and while doing so his fingers got jambed and crushed. Evidence was given that the accident could have been avoided by the use of tongs. No instructions were given the plaintiff except being warned not to let his fingers get too close to the shears.

Held, that no defect in the machine was proved, nor any negligence on the defendants part shown, and therefore the defendants were not liable for the injury sustained by the plaintiff.

Quære, whether the plaintiff was guilty of contributory negligence.

Bicknell for the plaintiff.

Wallace Nesbitt for the defendants.

HOWARD *v.* CORPORATION OF ST. THOMAS ET AL.

Municipal corporation — House being moved coming in contact with telephone wire across street, loosening bricks and injuring passer-by.

O. was moving a house, twenty-five feet high, along one of the streets in the city of S., having obtained the authority of the city engineer to do so, when by reason of its coming into contact with a wire, the existence of which O. was fully aware of, stretched by a telephone company, without any authority from the city, across the street, the wire being 19½ feet high, though the company's Act of Incorporation required it to be at least 22 feet, the wire was torn from its fastenings, loosening some bricks, which fell on the plaintiff, a passer-by, and injured him.

Held, that no liability attached either on the city or the telephone company, and that O. was alone liable for the injury sustained by the plaintiff.

W. R. Meredith, Q.C., for plaintiff.

Ermatinger, Q.C., for St. Thomas.

C. Macdougall, Q.C., for defendant Oliver.

Lash, Q.C., and *S. G. Wood*, for Telephone Co.

BOYD, C.] [June 5.

BOYD *v.* JOHNSTON.

Vendor and purchaser—Land subject to mortgage—Liability of purchaser to pay off mortgage.

A purchaser of an equity of redemption is bound as between himself and his vendor to pay

off the mortgage, and this quite irrespective of the frame of the contract between the parties.

When, therefore, lands were conveyed by the plaintiff to the defendant, which were subject to certain mortgages, the defendant was held bound to pay them off, and to protect the plaintiff from liability thereon.

Walter Cassels, Q.C., and *A. Skinner*, for the plaintiff.

Pepler, Q.C., for the defendant.

STREET, J.] [June 23.

ONTARIO NATURAL GAS CO. *v.* SMART ET AL.

Municipal corporations—Mineral gas—Municipal Act, s. 565—Indemnity—By-law, form of.

Mineral gas is a "mineral" within s. 565 of the Municipal Act, R.S.O., c. 184.

The lease under said section should be of the right to take minerals, and not of any portion of the highway itself. The lease here was of a portion of the highway, "for the purpose of boring for and taking therefrom oil, gas, or other minerals." The quantity of land was no more than was necessary for the company's purposes, and the rights of the public were fully protected.

Held, that the practical difference in this case was so small as not to constitute a ground for quashing the by-law.

The Council, before passing the by-law, insisted on an indemnity from the gas company against any costs and damages that might be incurred by reason of the passing thereof.

Held, that, under the circumstances, this could not be deemed to be evidence that the by-law was not passed in the public interest.

The plaintiffs, by first sinking a well on their land near the defendants' well, did not thereby acquire the right to restrain the defendants from using the natural reservoir of gas lying under the land.

Robinson, Q.C., and *H. S. Osler*, for plaintiff.

Aylesworth, Q.C., for defendants other than Walker.

W. H. Blake for defendant Walker.

MACMAHON, J.] [June 23.

REGINA *v.* CLARKE.

Taverns and shops—Selling liquor without license.

The defendant being present in Court on a charge, which was disposed of, was, without any fresh summons having been issued against him, arraigned on another charge, namely, of selling liquor without a license, and the information read over to him, to which he pleaded not guilty. Evidence for the prosecution was given, when defendant obtained an enlargement until the next day, and on his not then appearing, was convicted in his absence and fined $50 and costs, and in default of payment forthwith, imprisonment.

Held, that under the circumstances the issuing of a summons was waived.

Held, also, that the conviction was properly drawn, that distress should not have been awarded as an alternative remedy for non-payment of the fine, for s. 70 of R.S.O., c. 194, under which the conviction was made, gives no authority to award distress.

Jones for the applicant.

Curry, contra.

ROSE, J.] [June 26.

THE TORONTO BELT LINE RAILWAY CO. *v.* LAUDER.

Railways and railway companies—Warrant for possession of land.

The application for a warrant for possession of land required by a railway company under s-s. 23 of s. 20 of R.S.O., c. 170, should be made to the County Court judge, and not to a judge of the High Court.

Part I. of R.S.C., c. 109, only applies to railways constructed or to be constructed under the authority of a Dominion Act, and does not apply to a railway company incorporated by a local Act, as the applicants here are by 52 Vict., c. 82 (O.), though held to be under Dominion control as being a railway for the general advantage of Canada.

Edgar, Q.C., for the railway company.

Delamere, Q.C., for the defendant.

ROSE, J.] [June 24.

RE PARKER.

Extradition—Junior judge of County Court—R.S.C., c. 142, s. 5—Justices, proof as to——State officer's depositions taken in absence of accused—Identity of forged note.

The expression, "all judges, etc., of the County Court," contained in s. 5 of the Extradition Act, R.S.C., c. 142, embraces the junior judge of said court.

On a charge of forgery of a promisory note alleged to have been committed in the State of Kansas, the justices before whom the depositions were made were certified to be justices of the the peace, with power to administer oaths.

Held, that he was a magistrate or officer of a foreign state within s. 10 of the Act; and also that it was not necessary that he should be a federal and not a state officer; and further that the depositions need not be taken in the presence of the accused.

The depositions failed to shew that the note alleged to be forged was produced and identified by the deponents or any of them.

Held, that this constituted a ground for refusing extradition.

R. M. Meredith for prisoner.

Aylesworth, Q.C., and *McKillop*, contra.

The extradition judge has no power to remand the accused to hear further evidence as to the identity of the note.

Shepley, Q.C., for the prisoner.

Aylesworth, Q.C., contra.

MACMAHON, J.] [June 29.

MCPHEE *v.* MCPHEE.

Bills of exchange and promissory notes—Non-negotiable promissory note—Endorsement of—Character in which endorsement made.

Where a non-negotiable promissory note given for money lent to a firm is made by one member thereof and endorsed by the other, the character in which the endorsement is made will be implied from the purposes for which the note is given, the endorsement obtained, and the particular circumstances of the case.

McVeity for the plaintiff.

O'Gara, Q.C., for the defendant.

STREET, J.] [July 4.

JOHNSTON *v.* MCKENZIE.

Executors and administrators—Executor becoming bankrupt and intemperate—Injunction restraining dealing with assets and appointment of receiver.

Where a person named as an executor was at the time of the making of the will in good credit and circumstances, but subsequently became insolvent and made an assignment for the benefit of his creditors, and also apparently intemperate, an injunction was granted restraining the executor from interfering with the estate, and the appointment of a receiver directed.

Hoyles, Q.C., for the plaintiff.

J. Hoskin, Q.C., for the infant defendant.

R. M. Meredith for the defendant McKenzie.

Practice.

BOYD, C.] Sept. 16.]

BROWN v. HOSE.

Costs—Scale of—Rule 1174—"Order as to the costs"—Jurisdiction of taxing officer—Action for goods sold and delivered—Ascertainment of amount—Pleadings—County Court jurisdiction.

Where in an action in the High Court an order was made by a local judge upon consent allowing the plaintiffs to sign judgment for $233, with costs of suit to be taxed:

Held, that full costs were not implied unless it was a case for suing in the High Court; and the jurisdiction of the taxing officer to decide as to the scale of costs was not ousted.

History of Rule 1174.

The claim was $233, the price of furniture sold by the plaintiffs to the defendant, according to prices endorsed on the writ, and duly delivered. By his statement of defence the defendant admitted $160.50, which he paid into Court. As to the balance, he pleaded that it was not payable because the goods ordered in respect thereof were not supplied or delivered, and that there was no agreement therefor within the Statute of Frauds.

Held, that the pleadings only must be looked at to ascertain what was in dispute; that the cause of action was one and indivisible; and that the *whole* cause of action was not for an ascertained amount within County Court competence.

Aylesworth, Q.C., for the plaintiffs.

W. H. Blake for the defendants.

MACMAHON, J.] [Sept. 17.

HESPELER *v.* CAMPBELL.

Time—Notice of appeal—Long vacation—Rule 484—R.S.O. c. 44, s. 71—Extending time—Rule 484.

Upon the true construction of Rule 484 the period of long vacation is not to be reckoned in

the time allowed by s. 71 of the Judicature Act for filing and serving notice of appeal to the Court of Appeal.

Semble, also, that under the circumstances of this case, if the notice had been late, the time would have been extended under Rule 485.

Bain, Q.C., for the plaintiff.

Walter Barwick for the defendants.

BOYD, C.] [Sept. 27.

BREADY *v.* ROBERTSON.

Security for costs—Action against justices of the peace—53 Vict. c. 23—Character of property of plaintiff.

Upon applications under 53 Vict. c. 23, for security for costs in actions against justices of the peace, the rule should not be more, but rather less, onerous than in ordinary applications for security where the plaintiff is out of the country.

S. 2 of the Act provides that it is to be shown that the plaintiff is not possessed of property sufficient to answer the costs of the action.

Held, that the court should be less exacting as to the character of the property where the person is a *bona fide* resident than in the ordinary case of a stranger who seeks to justify upon property within the jurisdiction; the test is, is it such property as would be forthcoming and available in execution.

And where the plaintiff had property, partly real and partly personal, to the value of $800 over and above debts, incumbrances, and exemptions, security for costs was not ordered.

A. D. Cameron for plaintiff.

Bicknell for defendants.

MR. DALTON.] [Oct. 1.

KELLY *v.* WADE.

Order of court—Effect of not issuing—Abandonment.

Where an order was in June, 1889, pronounced by a Divisional Court, upon the application of the defendants, setting aside a judgment recovered by the plaintiff at the trial and directing a new trial, but was never issued,

Held, that the original judgment must be considered to be still in force; and a motion to set aside execution issue thereon was refused.

Aylesworth, Q.C., for defendants.

W. H. Blake for the plaintiff's solicitor.

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Law Students' Department.

EXAMINATION BEFORE TRINITY TERM : 1890.

CERTIFICATE OF FITNESS.

Benjamin on Sales—Smith on Contracts.

Examiner: R. E. KINGSFORD.

1. What is the principal difference between an offer under seal and one not under seal?

2. Will part performance of a contract of a corporation be a good answer to the objection that the contract is not under seal? Why?

3. What difference is there between the 4th and 17th sections of the Statute of Frauds in regard to the necessity that the consideration should appear in the writing?

4. If an action is brought in Ontario on an agreement made in Germany, would the Statute of Frauds apply? Why?

5. What exception to the rule that agreements not to be performed within a year must be evidenced in writing?

6. Will a written acknowledgment of a debt containing a refusal to pay it be sufficient to prevent the operation of the Statute of Limitations? Why?

7. How far is knowledge on the part of the defendant of the falsehood of his representations necessary to be proved in order to establish a case of fraud?

8. In what respect is the title of the assignee of a bill of lading better than the title of his assignor?

9. Will an action lie by the executors of a woman for breach of promise to marry her? Why?

10. What effect, if any, has a verbal understanding by which the operation of a written agreement is made subject to a condition?

Mercantile Law—Practice—Statutes.

Examiner: R. E. KINGSFORD.

1. A. is a member of a trading firm. He draws bills in his own name and discounts them with B. The proceeds of the discount are used for firm purposes. How far can B. charge the firm? Why?

2. Goods are bailed by A. to B. to be kept by the latter. B. bails them to C., who uses and wastes the goods. From whom can A. recover compensation for damages sustained? Why?

3. What is a *General Lien* on goods? How does it arise? How may it be extinguished?

4. A. is travelling by a conveyance owned by a common carrier, and takes with him into the conveyance his satchel, in which he has some jewellery. The satchel and contents are lost, having been left in the conveyance by A. during a stoppage on the road. How far is the carrier liable? Why?

5. What is the present statutory rule as to interest on judgments?

6. "Although a contract may on its face appear to bind only one party, yet there are occasions on which the law will imply corresponding obligations on the part of the other party." Give instances.

7. In case of non-delivery of goods according to contract what is the measure of damages?

8. If a garnishee does not dispute his liability on a return of the garnishing order but contends that the claim or demand is not due, what protection will be given the plaintiff?

9. Under what circumstances may relief by way of interpleader be granted?

10. A plaintiff claims by his writ for a liquidated demand and also for damages, and defendant fails to appear. What steps may the plaintiff take?

Equity.

Examiner: P. H. DRAYTON.

1. What is the rule of equity in regard to dealings between persons in confidential relations such as trustee and cestui que trust, solicitor and client, guardian and ward?

2. Give the general rule as to the liability of trustees for the acts of their co-trustees, and distinguish between such liability in cases of private trusts and those of a public nature respectively.

3. When, if at all, will the Court decree specific performance of an agreement to enter into partnership, and when will a dissolution be decreed of a partnership at the instance of one of the partners before the time has expired?

4. A. owns certain lands, of which he has a plan made, upon which a portion is shewn as a public park, the other portion is divided into lots facing on the park. He exhibits it to B., who purchases one of the lots. Afterwards A. commences to build on the park portion. B. brings an action to restrain same. Who should succeed, and why?

5. A., by his will, directs Blackacre to be sold, and the proceeds divided between C. and D. D. wishes to take his share in land. Can he do so? Why?

6. Distinguish between the duties as to disclosure incumbent respectively upon an applicant for a policy of insurance against fire, and upon a creditor who is procuring a person to become surety for him for payment of a debt.

7. What was, and what is now, the law with regard to contracts of married women binding their separate estate?

8. Distinguish between the relief granted by the Courts in arbitration, (1) where mistake of fact is alleged; (2) where mistake of law is set up.

9. A client of yours comes to you alleging that a certain nuisance is being perpetrated in his neighborhood injuriously affecting his property. State the steps you would take to have the same abated.

10. Explain briefly the rights and duties of a receiver appointed by the Court, and state some cases in which the Court will appoint one.

Real Property.

Examiner: P. H. DRAYTON.

1. What is the effect of destroying a valid conveyance, grantor and grantee assenting thereto?

2. What, if any, statutory provision is there with regard to mortgages under the Short Forms' Act, where the power of sale is to be exercised without notice?

3. How, if in any way, can a contractor, claiming a mechanic's lien, enforce the same without issuing a writ?

4. Explain consolidation and tacking respectively; and state how, if in any way, the same have been affected by Provincial legislation?

5. State to me briefly and concisely the steps you would take where a client brings in a vendor to you of a lot in Toronto which he is buying, from the inception to the close of the transaction, the property in question being subject to a mortgage which is assumed with interest from a certain date by your client.

6. A. dies having bequeathed $10,000 to his brothers and sisters equally; he has a uterine brother and sister, and two half-sisters by second marriage of his father, him surviving. How will the bequest go?

7. What are the four accepted rules to be observed in the construction of wills?

8. At a sale of lands under power of sale in a mortgage are any persons debarred from buying; if so, who, and for what reasons?

9. On the 1st of June, 1890, your client enters into a binding agreement with A. for the purchase of Blackacre. You search the title and find it correct; on closing on the 10th June you find an execution against the lands of A. Would you consider yourself safe in closing the deal; if so, why, if not, why not?

10. Distinguish between 13 Eliz., c. 5, and 27 Eliz., c. 4; and state how, if in any way, both or either have been dealt with by Provincial legislation?

Law Society of Upper Canada.

LAW SCHOOL—HILARY TERM, 1890.

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W. R. MEREDITH, Q.C.	N. KINGSMILL, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers: E. D. ARMOUR, Q.C.; A. H. MARSH, B.A. LL.B. Q.C.; R. E. KINGSFORD, M.A. LL.B.; P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School,

and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p. m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

VOL. XXVI. NOVEMBER 1, 1890. No. 17.

WITHIN the last few months the subject of trial by jury has been discussed in almost all its bearings, and the pros and cons have been stated with great clearness. The letter of Mr. Jelf, which has already appeared in our columns (*ante* p. 435), has been the text upon which many sermons have been preached. The last information received comes from Mexico. In that country the panel is composed of eleven "tried men and true," of whom a majority can convict, subject to review by an appellate court if the majority for conviction be less than eight. In order to provide for a possible vacancy in the panel by death or otherwise, two supernumeraries sit with the eleven throughout the trial. The impression that in many cases a jury might with benefit be dispensed with, appears to be growing in favor; but the idea, deep-rooted as it is in the Anglo-Saxon breast, that a man should be tried by twelve of his peers, will die hard.

OUR *confreres* in the Prairie Province are just now struggling with the intricacies produced by the numerous decisions rendered since the passing of the English "Common Law Procedure Act, 1852." The *Western Law Times* in a recent editorial, piteous almost in its appeal for remedial interference by the legislature, calls attention to anomalies at present existing, which to us in Ontario have been for years unknown. When judgment is signed on a specially endorsed writ, execution cannot issue until eight days from the last day for appearance, thus giving the debtor, as our contemporary laconically remarks, "eight days to abscond with all seizable goods." The creditor can, it is true, bind his debtor's *lands* immediately judgment is signed, but why should a distinction be made in favor of *goods* which so often are all that the unfortunate creditor might realize on? Another absurdity occurs in the case of a writ for service on a British subject out of the jurisdiction, when an order must be served with the writ, allowing the plaintiff to serve the writ, and a subsequent order must be obtained *allowing the service*, under which order a declaration must be *filed in the prothonotary's office*, but need not be served. Of great value this is, forsooth, to the absent defendant! These instances are taken out of many, but they serve to show the necessity of some new code of procedure. Surely our brethren could not do better than adopt our Judicature Act; it has its faults undoubtedly, but it has been pretty well hammered into shape.

WE are promised great light on the new Bills of Exchange Act. Two months ago (*ante* p. 417) we gave some extracts from the forthcoming work of the learned Master in Ordinary, Thomas Hodgins, Q.C. We hear that Mr. Maclaren, Q.C., has also in preparation an annotated edition of the same Act, and we have now before us the advance sheets of Mr. Edward H. Smythe's book. Between them all we surely ought to have all available information gathered for the instruction of the profession. They will doubtless differ in their treatment of the subject. Our readers can judge of Mr. Hodgins' labors by the extracts already given, and we can safely predicate from the past that his work will be fully and carefully done. Mr. Smythe (and we are glad to welcome this contribution from the old capital of this Province, historic Kingston) has committed the publication of his volume to The J. E. Bryant Publishing Company; and we must say that their part of the work, as well as his, so far as it has gone, is admirably done, the paper and printing being first-rate. We do not gather that it is intended by the author to attempt to compete with the standard works on Bills and Notes, but rather to give practising lawyers a convenient hand-book, pointing out the changes introduced by the recent Act and their effect upon the previous state of the law; whilst, at the same time, giving full references to the decisions in our own Courts, and further fortifying his propositions by the citation of leading cases in England.

WE yield to none in our love and admiration of the profession of the law. Its nobility cannot be successfully impugned, and it is because we are perfectly satisfied that it is a noble profession that we do not think that it needs any *ad captandum* arguments to prove it. It is for that reason we must respectfully demur to the argument put forth by Mr. R. Cunliffe, the President of the Incorporated Law Society, in his address at the recent annual meeting of the Society at Nottingham.

Mr. Cunliffe says: "Mr. Lake styled our profession 'noble,' and is it not so? Is it not our duty to advise those who require advice; to help those who are wronged to obtain redress for their wrongs; to assist the weak against the strong, the oppressed against the oppressor; to advise our clients how to keep their own and to recover that which is wrongfully withheld from them; to endeavor to obtain justice for all who seek our assistance in obtaining it; to arrange family disputes, and to endeavor (in matters in which we are consulted) to procure that each person interested in property gets his proper share of it and no more? And these being the duties of our profession, you will, I think, agree with me, that Mr. Lake was right in his choice of the term 'noble,' as applicable to it."

We can fancy some prosaic and level-headed auditor saying, "Mr. Cunliffe, I see you base the claim of your profession to be a 'noble' one on the ground that it is the duty of its members to help the wronged, to assist the weak, and the oppressed; but in all law suits, I have noticed that generally solicitors are employed, not merely on the side which is wronged, or weak, or oppressed. The wrongdoer, the strong, and the oppressor, all have their solicitors. If the claim of your profession to nobility rests on no better ground than this, it does not appear very well founded." And on the whole, we think the prosaic individual would be

somewhat near the truth. According to Mr. Cunliffe's roseate picture, one would imagine that solicitors were a chivalrous class of human beings, like the Knights Errant of old, going through the world with the sole mission of befriending the wronged and oppressed, whereas we know it is nothing of the kind. The nobility of the profession does not consist in its being always on the side of right. There are quite as many solicitors on the wrong side of cases as there are on the right, and probably more—and it must necessarily be so, because it is no part of a solicitor's duty to act as judge. Whether his client is right or wrong, he is entitled to his professional advice and assistance, and it is the solicitor's duty, as far as in him lies, to present his client's case in the most favorable manner consistent with truth to the court, and to see that the law is applied to it correctly no matter whether his client be right or wrong. The honest and faithful discharge of that duty by the profession constitutes, we believe, its true title to nobility.

THE editor of the *Albany Law Journal* has the courage of his convictions and is perfectly able to hold his own against the small canine fraternity who snap and snarl at those whose instincts and thoughts belong to a sphere immeasurably above them. A question arose as to whether one who denied the existence of God should hold the position of judge. The *Albany Law Journal* said no; and its views will be found *ante* p. 462. The writer again refers to the subject in the following manner:—

"Another correspondent, who has *not* the courage to sign his name, but who hails from Chicago, abuses us roundly for saying that no man who 'is so destitute of reason as to deny the existence of God can be qualified to pronounce the law,' calls us a fool, saying we 'make him sick,' and wants to know if Huxley, Tyndall and Spencer are fools. By no means. They are very wise men, but in our opinion, they were in this matter 'destitute of reason,' and blind to evidence. There was once a celebrated advocate in this State who believed that the earth is flat, or at all events, thought that there is no evidence that it is round. If we had said that on this point he was destitute of reason, probably the anonymous Chicago infidel would have agreed with us, and would not have accused us of calling him a fool. And yet, as it seems to us and a good many other people, the evidence in favor of the existence of a supreme intelligence is infinitely stronger than that in favor of the rotundity of the earth. We have no apology to offer for our opinion. It is one which has been held by the great majority of the wisest and greatest and best men who have ever lived. We prefer to agree with Washington and Webster and Napoleon rather than with Huxley, Tyndall, and Spencer on this point. It ill becomes this person to accuse us of uttering 'contemptuous' opinions, when in the same sentence he calls us a 'fool,' and we intend no contempt of his trinity of unbelievers when we reiterate that no man is fit to be a judge who does not believe in God, however clever and fit he may be to gather scientific facts, and however adroit he may be in arranging them in support of an incredulous or know-nothing theory. Such a man lacks the moral sense essential to a judge. Such teachings lead small and weak and

opinionated men to write anonymous letters. Think of a lawyer who will write an abusive and anonymous letter to another lawyer! This person has not even the plea of ignorance to excuse him, for he writes a good hand and spells correctly. But we would not take his stipulation without two witnesses. Make him sick, do we? Glad of it. Such fellows need to be made sick. We shall think we have not lived in vain if we make all of his sort sick enough to throw up their briefs. Bob Ingersoll would agree with us on this point."

THE letter of Mr. Saunders, which will be found in another column, points out an apparent inconsistency in the law of succession to intestates' estates under The Devolution of Estates Act (R.S.O., c. 108). The object of a law regulating the succession to property in the case of intestacy, ought to be to divide the estate in the way which any good man having regard to the natural claims of his relatives upon him, might reasonably be expected to do. In one sense, no doubt, no class of relatives have any right to claim the estate of a deceased person; it is all a matter of legal regulation, and if one class is included and another left out, the latter have no right to feel aggrieved. But we believe that the law in this respect, as in every other, ought to try and work out what the great majority of mankind looks upon as natural justice. In the case which Mr. Saunders puts of the intestate leaving a father and nephew, as the law now stands it would appear that the father alone will take, whereas if the intestate leave father and brother and nephew (child of a deceased brother or sister), the nephew will be let in to share, and will stand in the place his parent would have done if living. This certainly seems somewhat incongruous. We are disposed to think that this branch of the law is seriously in need of consolidation or codification, more especially since the revolution effected by the Devolution of Estates Act. It affects the estates of everybody in the community, and it is therefore particularly a branch of statute law, which should be included in our own Provincial Statutes, and not be left as at present, embodied in two or three ancient Imperial Statutes. There are one or two other points in connection with the Devolution of Estates Act, which require to be clearly defined on the statute book, and one is, how a devisee is to be deemed to take, whether directly from the testator or indirectly through the personal representative, and whether a formal assent of the personal representative to the devise is necessary, and if so, in what shape that assent is to be manifested; and further, some means should be provided for the protection of *bona fide* purchasers from a devisee, from any claims of the personal representative, or creditors. The scheme of the Act is to place realty on the same footing as the personalty, and it appears to us that the same rules should be made to apply to both classes of property as far as practicable. Then some provision should be made for vesting an intestate's estate in some public functionary in the interval between the death and the grant of administration or probate, so that it may always have a representative *in esse*. There is not much sense in putting creditors to the expense and delay of obtaining administration

to a worthless estate, the only asset of which may be property on which the creditor holds security, and which may be insufficient to pay his claim. We think it should also be made plain what is the duty of an administrator as regards the realty after payment of the debts. The Courts have held that his powers are then at an end, and that he can do nothing in the way of selling the land for the purpose of making a division among the next of kin. Much of the utility of the Act will be lost by this construction. Of course the right of a personal representative to sell for the purpose of division should be surrounded by proper safeguards, but that the personal representative ought to possess this power seems open to little question. As regards personal estate the personal representative has the amplest powers, and no *bona fide* purchaser from him can be disturbed in his rights; the same rule it appears to us should be applied to the realty. All statutes, however, which derogate from the common law, are so construed by the Courts as to restrict their meaning and effect within the words actually used, and the general scheme and principle upon which the Act is based seems in such cases to go for naught. In this way the obvious legislative intention is very frequently frustrated by judicial interpretation. The canon of construction may be a good sort of "rule of thumb," but we venture very much to doubt whether it is a principle altogether abreast of modern ideas.

UNITED STATES LEGISLATION.

We must not lose all interest in our neighbours, notwithstanding their unkindness in passing the McKinley Bill, so we will take a glance at the address delivered by Mr. Henry Hitchcock, the President of the American Bar Association, at the recent meeting of that body at Saratoga Springs, in August last. It was the thirteenth annual meeting, and representatives from forty-two states and territories were present. Under the constitution the president is required to communicate in his opening address the most noteworthy changes in the statute law made in the several states and by Congress during the preceding year. This is truly a herculean task. Mr. Hitchcock tells us that Congress in the eight months preceding August 1st, enacted 219 public acts and thirty joint-resolutions, and 504 private acts, and four private joint-resolutions; while the twenty states and territories, whose legislatures met during the year, enacted 8,294 acts and joint-resolutions. Heaven forbid that any practitioner should be expected to know the whole law! Nor must the reader suppose that the American legislator never slaughters the innocents; the total number of bills introduced into the House of Representatives in Congress, during the period above mentioned, was 11,626, and in the Senate, 4,298 bills; in eleven of the states whose Houses met last year, 10,838 bills were introduced, while the public laws enacted in those same states were only 1,878, the private acts increasing the total by 3,705. The proportion both as between bills introduced and laws enacted, and as between public and private acts, varies very greatly in different states; *e.g.*,

in New Jersey, out of 839 bills introduced, 311 became laws, of which all but nine were public acts; in Kentucky there were 3,014 bills, and 1,926 acts passed, of which only 174 were public acts; and in Iowa, of 947 bills, only 135 blossomed into laws. The Legislators of Montana deserves the hearty thanks of the hard-worked lawyer, for though they sat ninety days they brought forth not a single law; there was a deadlock. How happy the Ontario solicitor would be if deadlocks were common in the Toronto House. *De minimis*, etc., may apply to the courts, but it does not to the Mississippi Legislature. During last session they passed twenty such laws as these—an act to prohibit the sale of liquor within two miles of Ethel school-house, in Attala county; an act to prohibit the sale of liquor within five miles of Mount Nebo Church; another to prevent it within three miles of Artesia; another to prohibit it within half-a-mile of Dunbar's canning factory, Bay St. Louis.

Congress passed acts whereby the new States of Idaho and Wyoming were admitted into the Union; bills were introduced for the relief of the Supreme Court of the United States. The necessity of relieving this Court appears from the fact that at the close of the October term, in 1885, nine hundred and four cases remained on the docket undisposed of; at the end of the same term, in 1886, the number was 948, while in 1889 the number had risen to 1,180. The Dependent Pensions Act, and the act with regard to the World's Exposition of 1892, will assist materially in diminishing the surplus in the treasury.

Georgia goes in for co-education of the sexes, and passed an act requiring all branch colleges of the State University to admit female students to equal privileges with those enjoyed by male students; she also establishes a first-class college in connection with the University, where white girls will be taught, among other things, decorative art, dress-making, and domestic economy; this is an idea for our Provincial legislators. New Jersey directs the display of the Stars and Stripes upon her school buildings during school hours. James the First of England and the Canada Methodist Conference will both be pleased to know that ten states issued counterblasts against the use of tobacco by minors; in New Hampshire a fine of $50, in Virginia one of $100, threatens him who sells cigarettes to youths, the Virginia Act placing that dangerous combustible in the same category with pistols, dirks, and bowie-knives. In the other seven the prohibition includes the sale or gift of the weed in any form, and in Kentucky, the persuading of any child to smoke it. But from this restriction the boys of Maryland and Wyoming are emancipated at the age of fifteen, though the latter denies them the consolation of pistols and bowie-knives until twenty-one; those of the Dakotas and Virginia, after sixteen; of Michigan, after seventeen; and of South Carolina and Kentucky, after eighteen; while in Georgia the herb remains proscribed *durante minore ætate*. Wyoming forbids the sale to any minor of any deadly weapon which may be concealed about the person, and North Dakota, with great wisdom, authorises the expulsion of minors from court-rooms during trials of a scandalous or obscene nature. Our own M.L.As. would do more good by introducing such a measure than by amending the act with regard to Line Fences.

Massachusetts forbids any elevator, running over 200 feet per minute, being operated by any person under eighteen, and any elevator whatever to be placed in charge of any person under fifteen. A statute of Washington declares that every avenue of employment shall be open to women, nor shall any person be disqualified by sex from pursuing any business, profession, or calling; but this shall not be construed to permit women to hold public offices. Michigan and North Dakota forbid the solemnization of marriages except by license, and the latter requires the consent of parents in the case of males under twenty-one, and females under eighteen. New Jersey now allows divorce in the case of desertion for two years, formerly it was three. Numerous enactments have been passed in fifteen states designed to protect the public safety, health, and morals. Kentucky passed several acts forbidding lotteries for the benefit of schools, colleges and similar institutions, and declaring it unlawful to advertise such schemes. The preamble of each of these acts in vigorous terms denounces lotteries as a most demoralizing and odious system of gambling, degrading to the State, inducing idleness and crime, productive of extensive evils and injury to the people of the Commonwealth, injurious to public morals, and immoral in all its tendencies. Michigan adopted high license and local option; Iowa made its prohibitory laws still more elaborate and stringent; North Dakota and South Dakota both adopted severe prohibitory statutes; Georgia makes it a misdemeanor to sell or furnish liquor to any intoxicated person.

Rhode Island, Michigan and Maryland, require safe heating appliances to be substituted for the deadly car stove, while Iowa goes in for automatic safety couplers and automatic power-brakes on all cars after a certain day. Massachusetts, Ohio and Michigan offer bounties for the destruction of English sparrows; North Dakota offers them for wolf scalps, with the ears attached; Wyoming for wolves, bears and mountain lions; while Massachusetts appropriates $50,000 for a special commission charged with the extermination of the gypsy moth. According to an Ohio statute, no cattle, sheep or hogs shall be considered natives of that state unless they have been within it for at least sixty days before being killed.

Considerable attention was given by the learned President to the subject of ballot reform and the so-called Australian Ballot System; he traced the progress of the system, first adopted in South Australia in 1859, soon after in Tasmania and New South Wales, then in New Zealand, Queensland, Victoria, and West Australia; it was substantially adopted by Great Britain in 1872. Thence spreading to British America, it was introduced into British Columbia, Ontario, Quebec, Nova Scotia, Manitoba and the Dominion Parliamentary elections and in Europe in substance at least, into Belgium, the Grand Duchy of Luxembourg, and Italy. Among the American States, Michigan first attempted to adopt it in 1885, but unsuccessfully. In 1887 Wisconsin applied some of the features of the Australian system to elections in the larger cities; in 1888, Kentucky applied it to some municipal elections, while in the same year Massachusetts enacted a law applying it to all elections. During 1889, bills adopting it were introduced into the legislatures of twenty states and the territories of Montana and Dakota, and in Connecticut, Indiana, Minnesota, Missouri, Rhode Island,

Tennessee, Wisconsin and Montana, it became law; and during the past twelve months the system has been adopted in New York, New Jersey, Michigan, Washington and Wyoming. There are thus fourteen states in which, though not in all of them to the same extent or with a like degree of completeness, the Australian system is now in operation. Supplemented by stringent enactments like the Corrupt Practices Act, this system, Mr. Hitchcock thinks, gives an assurance of the absolute purity of elections.

We cannot follow Mr. Hitchcock through the various constitutional amendments made by various states and referred to by him, but must conclude by saying that he does not consider biennial sessions a movement backwards in the march of free government, nor does he object to the constitutional restrictions imposed in various states upon the legislative power in private, special or local legislation, or think that it indicates a growing distrust of representative institutions, but considers such restrictions only "obstacles in the way of the people's whim, not of their will." *R.*

COMMENTS ON CURRENT ENGLISH DECISIONS.

ERRATUM—In paragraph 1, p. 485 for "R.S.O., c. 3" read "R.S.O. c. 111."

The Law Reports for October comprise 25 Q.B.D., pp. 421-484; 15 P.D., pp. 136-184: and 45 Chy.D., pp. 1-86.

BILL OF SALE—PLEDGE OF GOODS—DOCUMENT CONTAINING TERMS OF PLEDGE—POSSESSION.

Mills v. *Charlesworth*, 25 Q.B.D., 421, is one of those comparatively rare instances in which the Court of Appeal fails to come to an unanimous decision. The question was whether a document embodying an agreement for the pledge of certain goods was or was not a bill of sale within the meaning of the *Bills of Sale Act*, 1878 (see R.S.O. c. 125). The goods in question had been seized by the sheriff under a *fi. fa.*; the owner of the goods then agreed with the defendant Charlesworth that he should advance the money to pay off the execution, and that the sheriff's bailiff should hold the goods as security for Charlesworth's advance, and a memorandum was signed by the debtor authorizing Charlesworth to hold possession and sell the goods. The debtor continued to reside in the house where the goods and the bailiff were, and the goods remained undisposed of for over a fortnight. The debtor then in fraud of Charlesworth executed a bill of sale to the plaintiff who took without any actual notice of Charlesworth's claim. This bill of sale was duly registered, and on Charlesworth discovering its existence he removed and sold the goods. Lord Esher, M.R., was of opinion that the defendant had actual possession by the bailiff, but Lindley and Lopes, L.JJ., were agreed that there had been no actual change of possession, that the title of the defendant could not be proved without reference to the agreement, and therefore it was a bill of sale. Lord Esher, however, thought that the transaction was covered by *Re Hubbard*, 17 Q.B.D., 690, and that it was only a pledge because accompanied by an actual delivery of possession, and therefore that the writing recording the pledge need not be registered. The judgment of Day, J., at the trial was therefore affirmed.

HIGHWAY, LIABILITY TO MAINTAIN—FOOTWALKS.

In re Local Board of Warminster, 25 Q.B.D., 450, may be referred to as an authority for the proposition that when a Statute imposes a duty on a municipal authority to maintain a road, it includes the footwalks at the side of the road.

PRACTICE—OFFICIAL REFEREE, JUDGMENT OF—APPEAL—POWER OF COURT TO ENTER JUDGMENT—ORD. XXXVI., R. 52; ORD. LIX., R. 3—(ONT. JUD. ACT, S. 103).

In *Clark* v. *Sonnenschein*, 25 Q.B.D., 464, the Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.) affirmed the decision of the Queen's Bench Division, 25 Q.B.D., 226 (noted *ante* p. 452), to the effect that on appeal from the direction of a referee to enter judgment, the Court may order any judgment it sees fit to be entered. It has been already pointed out that under the Ontario practice the referee to whom a cause is referred has no power to direct a judgment to be entered. He can only find the facts, and a motion must be made to the Court for judgment; this case, however, may be taken to settle the point of practice that notwithstanding the wording of Ont. Jud. Act, s. 103, to the effect that the finding of a referee, unless set aside by the Court, is to be equivalent to the verdict of a jury; it does not follow that the Court can only set aside a finding of a referee in the same way and on the same grounds that a verdict of a jury can be set aside. Lord Esher, M.R., lays it down that a finding of the referee is subject to the same rules of appeal as the decision of a judge trying a case without a jury, which is probably to be taken to refer both to the grounds on which the finding may be set aside, and to the tribunal by which it may set it aside. In Ontario, however, the decision of a judge trying a case without a jury can only be set aside by a Divisional Court, or the Court of Appeal, whereas the judgment of a referee may be set aside by a single judge.

PRACTICE—"JUDGMENT" AND "ORDER," DIFFERENCE BETWEEN.

In *Onslow* v. *Commissioners of Inland Revenue*, 25 Q.B.D., 465, it became necessary for the Court of Appeal (Lord Esher, M.R., and Lindley, and Bowen, L.JJ.) to determine what is the difference between an order and a judgment. Following the decision of Cotton, L.J., in *Ex parte Chinery*, 12 Q.B.D., 342, they came to the conclusion that a judgment is a decision obtained in an action by which a previous existing liability of the defendant to the plaintiff is established, and that other decisions were orders. In the present case the decision sought to be appealed from was given upon a case stated under a Statute, and it was held that it not being given in an action, the decision was therefore not a judgment but an order.

HUSBAND AND WIFE—MARRIED WOMAN—SECOND MARRIAGE—DEBTS CONTRACTED BEFORE MARRIAGE—RESTRAINT UPON ANTICIPATION—MARRIED WOMAN'S PROPERTY ACT, 1882 (45 & 46 VICT., C. 75), SS. 13, 19—(R.S.O., C. 132, SS. 15, 20).

In *Jay* v. *Robinson*, 25 Q.B.D., 467, a new point under the Married Women's Property Act arose. By sec. 13 (see R.S.O., c. 132, s. 15) it is provided that

after marriage a wife shall continue to be liable in respect of and to the extent of her separate property for "all debts contracted by her before marriage." By sec. 19 (see R.S.O., c. 132, s. 20), nothing in the act is to interfere with or affect any settlement or render inoperative any restraint against anticipation; but it is provided that no restriction against anticipation contained in a settlement of a woman's own property to be made or entered into by herself shall "have any validity against debts contracted by her before marriage." In this case a judgment for a sum of money was recovered against a married woman, who subsequently obtained a dissolution of her marriage and married again; and by a settlement made on her second marriage, property belonging to her was settled to her separate use without power of anticipation. The question, therefore, for the Court was whether the property thus settled was liable for the satisfaction of the debt so incurred during the first marriage. For the defendent it was contended that the only debts before marriage which were protected and within the saving clause of s. 18 (Ont. Act, s. 20) were debts contracted by a married woman before any marriage at all had taken place and such as create a common law liability. But the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) were unanimous that the liability which a married woman is empowered to incur under the Married Woman's Act is a debt within the Statute, and that the words "before marriage" in s. 13, (Ont. Act, s. 15) are not confined to a first marriage, but relate to the marriage actually existing at the time of the inquiry.

SHIP—BILL OF LADING—EXEMPTION OF SHIP-OWNER'S LIABILITY—NEGLIGENCE.

Norman v. *Binnington*, 25 Q.B.D., 475, is a case on the construction of a clause in a bill of lading whereby the ship-owner was exempted from liability for injury to the cargo arising from *inter alia* "negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship *or otherwise*, loss or damage arising from rain, storage, or contact with other goods being excepted, and the ship not being liable for any consequence of the causes herein excepted, however caused or originated." The goods in question after being placed on board were injured by reason of persons, for whose acts the ship-owner was responsible, negligently exposing them to rain and contact with other goods which were wet. Charles, J., before whom the action was tried, was of opinion that the ship-owner was liable, and that the injury was not within the exemption of the bill of lading, but on appeal to a Divisional Court (Cave and A. L. Smith, J.J.) this decision was reversed. It was admitted that the exemption protected the ship-owner from liability for damage by rain or contact with other goods which were wet, but it was contended that the exemption did not apply when such damage was brought about through the negligence of the ship-owner's servants; but the Divisional Court held that the words "or otherwise," which we have italicised above, extended the ship-owner's exemption from liability for the negligence of his servants to all acts of negligence on their part which might result in bringing about any damage from which the ship-owner was to be exempted.

EASEMENT — AIR—PRESCRIPTION—RIGHT TO VENTILATING SHAFT ON PROPERTY OF ANOTHER—LOST GRANT.

Bass v. *Gregory*, 25 Q.B.D., 481, was a rather curious case. The plaintiff claimed an easement by prescription, or lost grant, under the following circumstances: Upon the plaintiff's premises was a cellar hewn out of the rock, which cellar, for the past forty years, had been used for brewing, and which had been ventilated by means of a shaft cut therefrom through the rock into a disused well on the defendant's premises. The opening of this well the defendant had interfered with and the plaintiff claimed an injunction. Pollock, B., before whom the case was tried, held it to be a case in which a lost grant ought to be presumed, and granted the injunction.

PROBATE—LOST WILL—WILL PROVED BY ORAL EVIDENCE.

The only case in the Probate Division which we think necessary to refer to is the important one of *Harris* v. *Knight*, 15 P.D., 170, in which the other branch of the Court of Appeal, presided over by Cotton, L.J., failed to agree with their chief. The case was one in which probate was sought of a lost will. It was proved that a document purporting to be a will had been produced at the testator's funeral by his widow, which she claimed gave her a life interest in a freehold estate which constituted his only property, and after her death it was to be divided among the testator's sons and daughters. The paper was subscribed with three names, one of which purported to be that of the alleged testator, but there was no evidence that there was any attestation clause. The defendant, who was the eldest son, who read the paper at the funeral, said at once it was no will of his father's and that the signature purporting to be his was not. No steps were taken to prove the will, but the widow lived on the property undisturbed until she died, a period of eight years. There was evidence to identify the signature of one of the witnesses to the alleged will. Cotton, L.J., in the absence of proof of there being any attestation clause, or of the due execution of the will, thought the will was not proved, whereas Lindley and Lopes, L.JJ., were of the opinion that the maxim *ommia præsumuntur rite esse acta* ought to be invoked in favor of the will.

PRINCIPAL AND AGENT—BRIBES RECEIVED BY AGENT—INVESTMENT OF MONEYS RECEIVED AS BRIBES BY AGENT—FOLLOWING MONEYS.

In *Lister* v. *Stubbs*, 45 Chy.D., 1, the plaintiffs claimed that the defendant, while in their employment as foreman, took from one of the firms from whom he bought materials for the plaintiffs large sums by way of commission, a portion of which he had invested, and the plaintiffs claimed to recover from the defendant the amounts he had so received, and that they were entitled to follow the money into the investments, and they moved for an interlocutory injunction to restrain the defendant from dealing with the investments, or for an order directing him to bring the money into Court. But Stirling, J., refused the motion, holding that the relation between the defendant and the plaintiffs was

that of debtor and creditor, and not that of trustee and *cestui que trust*, and therefore they had no more right than any other creditor to interfere with the defendant's use and enjoyment of his property before judgment, and his decision was affirmed by the Court of Appeal (Cotton, Lindley, and Bowen, L.JJ.).

COMPANY—DIRECTORS—INVALID ALLOTMENT OF SHARES—RATIFICATION—PRINCIPAL AND AGENT.

In re Portuguese Consolidated Copper Mines, 45 Chy.D., 16, the principle to be deduced from the decision of the Court of Appeal (Cotton, Lindley, and Bowen, L.JJ.) affirming North, J., appears to be this, that when in answer to an application for shares an allotment is made at an invalid meeting of directors, and notice of the allotment is sent to the applicant, such allotment may at any time before the application is withdrawn be ratified at any regular meeting of directors; and a refusal to pay the allotment or an appeal *ad misericordiam* not to press the shares on the applicant; are not equivalent to a withdrawal of the application, neither is a refusal to accept the certificates of allotment, unaccompanied by any distinct repudiation of the allotment; and that where the ratification takes place three or four months after the allotment, and before any repudiation of the allotment, it is within a reasonable time; and, further, that the company bringing an action to enforce payment of the allotment, or a resolution passed at a duly constituted meeting of directors, are both sufficient acts of ratification by the company.

CREDITOR'S DEED—RESULTING TRUST.

Cooke v. *Smith*, 45 Chy.D., 38, presented a neat point for decision, but the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) came to the conclusion that Kekewich, J., failed to solve it correctly. The point was this, an assignment of a debtor's estate for the benefit of creditors, which provided for the distribution of the estate among the creditors (who released the debtor from liability), but which contained no express provision for the disposal of any surplus which might remain after paying the creditors in full: and the question was, in such a case is there any resulting trust for the assignors which would entitle them to bring an action of account against the trustees. Kekewich, J., said "no," but the Court of Appeal were of the contrary opinion. Kekewich, J., thought the whole of the estate was divisible among the creditors in proportion to their claims, no matter what it might yield. But there was a provision enabling the trustees to pay certain creditors for small amounts in full, in advance of other creditors, and the Court of Appeal laid hold of this circumstance as indicating that the true intention was merely to provide for the payment of the claims in full.

MARRIED WOMEN'S PROPERTY ACT, 1882—(45 & 46 VICT., C. 75) S. 5—R.S.O., C. 132, S. 7)—CONTINGENT TITLE—SPES SUCCESSIONIS—GIFT TO NEXT OF KIN OF PERSON WHO IS SUPPOSED TO DIE AT A FUTURE TIME.

In re Parsons, Stockley v. *Parsons*, 45 Chy.D., 51, a question arose under the Married Woman's Property Act, 1882. A testator died in 1879, and bequeathed

a sum of money to trustees upon certain trusts and subject thereto, in trust for "such person or persons as at the time of the failure of the preceding trusts would be my next of kin, and entitled to my personal estate, under the Statutes for the distribution of the personal estates of intestates, if I had then died intestate." This event happened on 21st May, 1886, and a woman, married in 1857, was one of the persons who would have been next of kin of the testator if he had died on the 21st May, 1886. She made a will disposing of her interest, dated in 1889, and died in the same year, leaving her husband surviving. The question was whether, under the circumstances, the will was valid. This depended on the date at which the title or interest of the wife accrued. Kay, J., was of opinion that up to the 21st May, 1886, the wife had a mere *spes successionis* which was neither an interest or title, and that the maxim *nemo hæres viventis* applied, so as to prevent her having an actual vested or contingent interest prior to that date. That therefore under the Act of 1882, the property having been acquired by her after the Act, it become her separate property under its provisions, free from any marital right of her husband. In arriving at this conclusion, the learned judge found it necessary to consider an Irish case: *Re Beaupres Trusts*, 21 L.R., Ir. 397, in which the Master of the Rolls, the Lord Chancellor, and Lords Justices of Ireland, had arrived at a contrary decision, but which, being in conflict with the English cases, he declined to follow.

WILL—LEGACIES PAYABLE OUT OF PROCEEDS OF SALE—DEFICIENCY—FAILURE OF ONE LEGACY—ABATEMENT—RESIDUARY LEGATEE.

The only case remaining for consideration is *In re Tunno, Raikes* v. *Raikes*, 45 Chy.D., 66, which was for the construction of a will. The testatrix had made a bequest of her diamonds upon trust for sale, and out of the proceeds to pay two legacies of £600 and £700. The £600 was for the repair of a church, "such repairs to be commenced within the period of twelve months from my decease." The repairs were not so commenced. The other legacy was declared invalid. The will contained a residuary bequest, but did not otherwise deal with the surplus, if any, derived from the diamonds. The diamonds realized £900, and the questions Chitty, J., was called on to decide were (*a*) Had the £600 legacy failed by reason of the repairs not having been commenced within twelve months; (*b*) Was that legacy entitled to be paid in full, or was there to be an abatement proportioned to the deficiency of the fund to pay the two legacies. Chitty, J., held that the clause as to the commencement of the repairs did not amount to a condition precedent, and that the residuary legatee was only entitled to what was left after payment of the £600 legacy in full.

Correspondence.

THE DEVOLUTION OF ESTATES ACT.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Few people will, I think, be disposed to deny that the Devolution of Estates Act was a step in the right direction. I, however, desire to call attention to a point which, I think, may have been overlooked. Section 6 provides that "when a person shall die without leaving issue and intestate as to the whole or any part of his real or personal property, his father surviving shall not be entitled to any greater share under the intestacy than his mother, or any brother or sister surviving."

Now equitable as is this provision, it does not appear to me to be sufficiently comprehensive to meet a contingency very likely to arise.

Under the English Statutes of Distribution, if the intestate leave neither wife, nor child, nor the descendants of any child, then, if the father be dead, the mother, brothers, and sisters of the intestate take the personalty in equal shares; but if any brother or sister shall have died in the lifetime of the intestate leaving children, such children shall stand *in loco parentis*, provided the mother or any brother or sister of the intestate be living at his decease, but not otherwise.

Now let us suppose that since the Devolution of Estates Act became law, a person in Ontario dies intestate without leaving any wife, child, or children, or their descendants, but leaving him surviving his father, mother, brothers, and sisters, and the descendants of a deceased brother or sister. As the law stood prior to the 1st August, 1886, the father would, in the case put, have taken the whole of the personalty; but since that date he will very justly be allowed to take only a distributive share of the estate, and the descendants of the deceased brother or sister may, it is thought, be permitted by virtue of the Statutes of Distribution to stand *in loco parentis*, and in this way justice would be done all round.

But let us see what will be the effect under a different state of facts. Supposing the intestate leave only a father and the descendants of a brother or sister, what will happen then? The Devolution of Estates Act is silent as to the children of a deceased brother or sister standing *in loco parentis*, and the English Statutes of Distribution, and the cases decided thereunder, show that the children of a deceased brother or sister can only stand *in loco parentis* provided the mother or any brother or sister of the intestate be living at the time of his decease. And, therefore, as between the father and the descendants of a deceased brother or sister, the whole of the personalty would go to the father and sub-sec. 1 of sec. 4 of the Devolution of Estates Act at once comes to his aid and gives him the whole of the realty, thus completely excluding the children of the intestate's deceased brother or sister.

The Legislature could hardly have intended any such result, and if my view of the law as it now stands be correct, the Act ought to be amended, as if the descendants of a deceased brother or sister are entitled to share when the father, mother, and a number of brothers and sisters of the intestate are alive, they are surely equally entitled when the father only is alive.

Kemptville, Oct. 8, 1890. E. SAUNDERS.

OUR SCHOOL SYSTEM.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Your journal is not an educational publication; but as it is certainly the best we have for the discussion of questions concerning the education laws of Ontario, I venture to call your attention to the following little article which, with the aid of Mr. Punch and the authorities therein mentioned, I wrote, and the Editor of *The Week* kindly printed in the number of his paper for the 25th July, now past, and with the spirit of which I am glad to see, by his late address to a large audience at Guelph, the Minister of Education cordially agrees, and has foreshadowed his intention of proposing certain amendments in which I feel confident you and your readers will agree with like cordiality, and wish him success. The following is the letter referred to:—

"I read with much pleasure the paragraph in the leading article of *The Week* of the 25th July last, in which you remark and refer to *The Bystander* as agreeing with you—that three-fourths of those who use the Public schools are just as well able to pay for the schooling of their children as for their food and clothing, and are equally bound to do so: that there is reason to fear the very class for which gratuitous education is needed don't avail themselves of the provision; that if the state of the law is such that we are unable to get the children of the poorest educated, it should be altered for that purpose; and that the free education of all classes which is in many cases given in the high schools is something still more unreasonable; in all which I most cordially agree, as I do also with your concluding remark that the provision last mentioned is not merely unjust to those who make no use of these schools, but is frequently injurious to those who are induced to use them, when they might be better employed in manual labor. With reference to this last remark, I think it would do no harm to call the attention of your readers to the following extract from Mr. Punch's sensible and dramatic illustration of the case as respects the Public schools in England:—

TOO CLEVER BY HALF.

Being questions and answers cut on the straight.

Question.—So you have finished your education?

Answer.—Yes, thanks to the liberality of the School Board.

Q.—Do you know more than your parents?

A.—Certainly, as my father was a sweep and my mother a charwoman.

Q.—Would either occupation suit you?

A.—Certainly not; my aspirations soar above such pursuits, and my health, impaired by excessive study, unfits me for a life of manual labor.

Q.—Kindly mention what occupation *would* suit you?

A.—I think I could, with a little cramming, pass the examination for the Army, the Navy, or the Bar.

Q.—Then why not become an officer in either branch of the United Service, or a member of one of the Inns of Court?

A.—Because I fear that, as a man of neither birth nor breeding, I should be regarded with contempt in either the Camp or the Forum.

Q.—Would you take a clerkship in the city?

A.—Not willingly, as I have enjoyed something better than a commercial education; besides city clerkships are not to be had for the asking.

Q.—Well, would you become a shop-boy or a counter-jumper?

A.—Certainly not; I should deem it a sin to waste my accomplishments (which are many) in filling a situation suggestive of the servants' hall rather than of the library.

Q.—Well, then, how are you to make an honest livelihood?

A.—Those who are responsible for my education must answer that question.

Q.—And if they can't?

A.—Then I must accept an alternative and seek inspiration and precedents from the records of success in another walk of life, beginning with the pages of the Newgate Calendar!—*Punch*, *July* 12, 1890.

Punch is a moralist and philosopher of the laughing school; but our English proverb tells us, there is many a true word spoken in jest. The Roman philosopher and poet asks: *Ridentem dicere verum,—Quid vetat?* "What hinders a jester from speaking the truth?" Common sense answers, Nothing hinders, and *Punch's* illustration is apposite to his case in hand. It is not right that boys should receive *at the public expense* an education that unfits them for manual labor; and those who make the laws, which give them such education at the cost of the tax payer, are responsible and must answer the question *Punch's* examiner puts. Education at the public expense should be given only to those whose parents cannot pay for it, and should apply to such subjects as will be of use to them in such callings and employments as they may reasonably be supposed likely to be engaged in, and should certainly not be such as would unfit them for manual labor, the independence and respectability of which, especially in agricultural persuits, should be always strongly insisted upon. Institutions for higher education should be supported by voluntary contributions, or if aided from the public purse should only be so to a very moderate extent, and for purposes in which the state has a direct interest, or which are connected with the scholar's probable calling and means of support. No one should be placed at the cost of the taxpayer, in the position in which *Punch's* examinee finds himself by being *too clever by half.*"

You may be sure that I perfectly agree with the Minister in all he is reported as having said in his address, touching the injustice of taxing the whole people for the support of schools without providing for the attainment of the end for which the taxes are imposed, and as to the qualification and adequate remuneration of the school teachers, and his plan of switching pupils off the usual track of education in the High Schools to lines of commercial, industrial, and agricultural training. He might perhaps allow a similar switching off between the ordinary Public School and the High School, for there must certainly be a majority of passengers in the educational train who do not need to proceed beyond the end of the Public School track; all could not with advantage avail themselves of through tickets, and should certainly not be provided with them at the cost of the taxpayers. Anyone who desires further information and fuller arguments in support of the Minister's views, may read with advantage the article on "Over Education" in the *Westminster Review* for September last, (1890), the writer whereof holds a university education by no means necessary to success, even in some professions for which it has heretofore been deemed essential, and hints that the name of Mr. Gladstone may possibly close the list of great scholarly statesmen. W.

[We agree in the main with the views expressed by our valued correspondent. The subject is one which doubtless will receive more attention as time goes on and the objections to the present system develop themselves. But while we gladly open our columns to the discussion of this subject, to the above extent, we have not space to pursue it further, even were it strictly within the field of our labors as a legal journal, which it can scarcely be said to be.—Ed. L.J.]

Notes on Exchanges and Legal Scrap Book.

CARRIERS—LIABILITY FOR BAGGAGE.—Plaintiff, having bought tickets of defendant railroad company for himself and family, pointed out to the baggage-master their baggage, consisting of three trunks and two boxes, and they were all checked except one box, a small, rough, pine box, such as is used for merchandise. This box was not checked for the sole reason that it had no handle or place to which a check could be fastened, but the agent received it, saying that he would place it in the baggage-car, and that it would go just as safe. Plaintiff made no misrepresentations, and was not asked as to the contents or value. For some reason it was not placed in the baggage car, but was left behind on the platform, and afterwards put in the baggage-room. That evening the night baggage-master, who knew that plaintiff intended to have the box go on the train with him, delivered it to one who falsely claimed to have authority to receive it, and at his request it was checked as baggage for him to a place other than that plaintiff had gone to. *Held*, that the railroad company was liable to plaintiff for the contents of the box. As a carrier of passengers the company was bound, unless there was reasonable ground for refusal, to take all persons who applied for passage, and their baggage, not exceeding one hundred pounds of weight to each passenger, and, as a carrier of such packages of freight as above described, to take them when offered for transportation by the accompanying passenger; and it was responsible, when duly delivered and accepted, for the safe convevance and delivery of such baggage, and of such packages, to and at the point for which they were destined, unless prevented by an act of the public enemy, by act of law, or by an irresistible, superhuman cause. A delivery to a duly-authorized agent of a common carrier, who is in the habit of receiving packages, is undoubtedly a sufficient delivery. In this case the delivery to Barstow, the agent of the company, was to one intrusted to receive baggage and packages, and not to one engaged in other duties. A rough pine box, such as is used for merchandise, was presented for transportation, and exposed to the view of the proper agent. It was of small dimensions, and of a kind rarely if ever used for packing wearing apparel. If it was not properly baggage, it was a package of freight to go with the passengers. The property in the box was evidently not so packed as to assume the outward appearance of ordinary baggage, or so as to deceive or conceal. It was within the scope of the agent's business and duty to decide whether the company would receive and carry the box as baggage or as an article of freight. If the latter, it should have been so stated, and the terms made known and insisted upon, if the company was desirous of avoiding any sort of responsibility for it as baggage. This principle is, we think, fully sustained by what is stated in the opinion of the Supreme Court, in the case of *Railroad Co.* v. *Swift*, 12 Wall. 274, to-wit: "But if property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportation on the passenger train,

there is no reason why the carrier shall not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage." To the same purport is the case of *Railway Co.* v. *Shepherd*, 7 Eng. Ry. Cas. 310: "If the traveller takes with him other articles, which do not come strictly within the denomination of baggage, and exposes them to view, so that no concealment is practiced, and the carrier chooses to treat them as personal baggage, and carries them accordingly, and a loss occurs, he will be responsible therefor." The company had given to its agent authority to receive and check baggage, and had also given him power to determine what property came within that class or description of property. He had similar power with regard to freight to be placed in the baggage-car. In the usual and ostensible scope of his employment he received the box without hesitation, and said he would place it in the baggage-car, and it would go just as safe as if checked. But although thus delivered and accepted it was not transported at all. Yet it was taken into the custody of the company by its proper agent, and the company's liability as a carrier commenced at the instant of the acceptance. In Ang. Carriers, sec. 129, it is said that "the entire weight of the responsibility rigorously imposed by law upon a common carrier falls upon him contemporaneously [*eo instante*] with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward; for the obligation to carry safely on delivery, carries with it a promise to keep safely before the goods are put *in itinere*." And again, sec. 131: "A person who is a common carrier may at the same time be a warehouseman, and after he receives the goods, and before they are put *in itinere*, they may be lost or injured. In such case, if the deposit in the warehouse is a mere accessory to the carriage, or, in other words, if the goods are deposited for the purpose of being carried, such person's responsibility as a common carrier begins with the receipt of the goods: that is, he then becomes responsible for all losses not occasioned by inevitable casualty; whereas, if he were a mere warehouseman, he is not liable unless he has been guilty of ordinary neglect." In *Railway Co.* v. *Belknap*, 21 Wend. 354, it was considered that where the baggage was received, but lost before transportation, the railway company was answerable, as a common carrier, for the safe-keeping of the property; and that its liability existed independent of any other contract, express or implied, for the safe-keeping of the property, and without regard to any question of negligence, and that the judge would have been well warranted in instructing the jury that the owner was entitled to their verdict. See also *Hickox* v. *Railway Co.*, 31 Conn. 281. If a trunk is delivered at a railroad station at 11 a.m. to go in a train at 3 p.m., the railroad is liable as a carrier from the time of delivery. About ten hours after the reception of the box, and the departure of the plaintiff and his family on the train, the night baggage-master, Staibler, who had been present at the delivery, undertook to surrender it to a third party, and did so. The question of fact as to Truesdell's authority to receive it as agent of plaintiff was determined in the negative by the jury, under careful and accurate instruction from the court, and upon sufficient evidence. Where the defence is that a delivery was made to an agent of the owner

or consignee, it must be clearly proved that the person to whom the goods were delivered as agent was duly authorized as such. The carrier is under as much obligation to deliver property to the right person as he is to deliver it in a reasonable time at the proper place. Although Truesdell had before been an "advance agent" of plaintiff for the purpose of posting advertisements, etc., it by no means follows from this alone that he had any authority to receive and take away to State Centre property just consigned by the owner himself into the custody of the company for transportation to Missouri Valley Junction, and which the owner, to the actual knowledge of both of the defendant's agents, intended to take in the same train with him to the latter place. If Staibler had not what was almost equivalent to actual notice of the dissolution of all business relations between the plaintiff and Truesdell, yet he certainly had enough in the acts and statements of the latter, under all the circumstances, to put a person of ordinary prudence and care upon guard and inquiry. If the delivery by a carrier be to the wrong person, although it be entirely by mistake, or by gross imposition, or upon a forged order, the carrier will nevertheless be responsible for the value of the goods so lost. Story Bailm., sec. 545*b*, also sec. 450; Ang. Carr., sec. 324; *Winslow* v. *Railroad Co.*, 1 Am. Rep. 365. In *Stephenson* v. *Hart*, 4 Bing. 476, the delivery was, as in this case, to a person who showed that he had a knowledge of the contents of the box. And in *Duff* v. *Budd*, 3 Brod. & B. 177, the delivery was to a person to whom the defendant had before delivered parcels. Burrough, J., said: "Carriers are constantly endeavoring to narrow their responsibility and creep out of their duties, and I am not singular in thinking that their endeavors ought not to be favored. The question here is whether there was gross negligence. I think there was, and I am of opinion that the case was properly left to the jury, and that they have given a proper verdict." Moreover, even if this defendant were not liable as a carrier, but simply as warehouseman, yet this would follow, that warehousemen are not only responsible for losses which arise by their negligence, but also for losses occasioned by the innocent mistake of themselves and of their servants in making a delivery of the goods to a person not entitled to them. For it is a part of their duty to retain the goods until they are demanded by the true owner, and if, by mistake, they deliver the goods to the wrong person, they will be responsible for the loss, as upon a wrongful conversion. Dak. Sup. Ct., Dec. Term, 1876. *Waldron* v. *Chicago & N. W. R. Co.* Opinion by Shannon, C.J.—*Albany Law Journal.*

TRUST—FRAUD BY AGENT—SECRET COMMISSION—INVESTMENT—FOLLOWING FUNDS.—A foreman employed by a firm was in the habit of receiving a secret commission on all goods ordered by him on behalf of his principals from a certain firm. The sums so received had been invested by him in the purchase of certain land and houses. *Held*, that although the employers would be entitled to recover from the foreman the sums so received from him by way of commission, yet they were not entitled to follow the money into its investments. No case has been cited which precisely decides the point. Two cases, however, were referred to,

namely, *Morison* v. *Thompson*, L.R., 9 Q.B., 480, and *Metropolitan Bank* v. *Heiron*, 5 Ex. Div. 319. In *Morison* v. *Thompson* the plaintiff purchased a ship through the defendant, who was his broker, for £9,250. An arrangement had previously been made between the vendor and his broker that if the ship was sold for more than £8,500, the broker might retain the excess; an arrangement was also made between the vendor's broker and the defendant, that a portion of such excess should be paid to the defendant, and the defendant received from the vendor's broker £250. It was held that the plaintiff, the purchaser, could maintain an action in respect of the £250 for money had and received. Cockburn, C.J., in delivering the judgment of the Court, said (at p. 486): "In our judgment the result of these authorities is, that whilst an agent is bound to account to his principal or employer for all profits made by him in the course of his employment or service, and is compelled to account in equity, there is at the same time a duty, which we consider a legal duty, clearly incumbent upon him, whenever any profits so made have reached his hands, and there is no account in regard to them remaining to be taken and adjusted between him and his employer, to pay over the amount as money absolutely belonging to his employer. This was precisely the case in regard to the money in question acquired by the defendant in the course of his employment without the knowledge or sanction of the plaintiff; it was actually in his hands subject to an immediate duty to hand it over to his employer. Under such circumstances the money, being the property of the employer, can only be regarded as held for his use by the agent, and must, consequently, be recoverable in an action for money had and received." The facts of that case were very similar to those of the present. There was no statement there that the money ever came to the hands of the defendant from the plaintiff. The case decided that the legal right of the master was not merely to obtain damages, but to recover the money received by the servant as an ascertained sum in an action for money had and received. The case of *Metropolitan Bank* v. *Heiron* is different in its facts, but the judgments of the Court of Appeal throw great light on this class of cases. The judgment of Cotton, L.J., in that case is particularly important. He says: "It was urged that no time runs against a breach of trust; but that argument was founded on an insufficient definition of what is meant by a breach of trust. Where a trustee has a fund in his possession, and wastes it, either by neglect of duty or by doing an act not justified, and the *cestui que trust* comes to recover his money, no time will bar his suit, for it is a claim by the *cestui que trust* against his trustee for money or property, which was in the possession of the trustee for the benefit of the *cestui que trust* until the trustee duly discharges himself. To such a case there is no bar by statute. * * * This case is a suit founded on breach of duty or fraud by a person who was in the position of trustee, his position making the receipt of the money a breach of duty or fraud. It is very different from the case of a *cestui que trust* seeking to recover money which was his own before any act wrongfully done by the trustee. The whole title depends on its being established by a decree of a competent court that the fraud of the trustee has given the *cestui que trust* a right to the money." The question then is under which head does

the present case fall? Is it "a suit founded on a breach of duty or fraud by a person who was in the position of trustee, his position making the receipt of the money a breach of duty or fraud?" Or is it the case of "a *cestui que trust* seeking to recover money which was his own before any act wrongfully done by the trustee?" It seems to me that the case of *Morison* v. *Thompson* does not settle this question. It may be assumed in favor of the plaintiffs that they can recover the money in an action for money had and received, but it does not follow that they can follow it. It is not true to say that in every case in which an action for money had and received would lie, the money can be followed. Take the case of a contract for the sale of real estate. and a deposit paid to the vendor; there, if it is discovered that the vendor has no title, the purchaser is entitled to recover his deposit as money had and received. Suppose, however, that the vendor, believing himself entitled to the money, has invested it in business and made profits. It has never been held that the purchaser can follow it into the investments. There is no case in which it has been decided that money received under such circumstances as exist in the present case can be followed. All that *Morison* v. *Thompson* decided was that there was a legal right to recover the money. The true test appears to me to be that laid down by Cotton, L.J., in the judgment which I have read. "Is this the case of a *cestui que trust* seeking to recover money which was his own before any act wrongfully done by the trustee?" The orders given by the defendant to Messrs. Varley were given, no doubt, in the expectation that a commission would be paid. But there was no legal obligation on Messrs. Varley to pay it. If it had not been paid the defendants would have had no remedy in a court of law. The wrongful act was the receipt of the money in breach of duty. But the money was not money of the plaintiffs but of Messrs. Varley. Applying that test, I come to the conclusion that the plaintiffs are not entitled to follow the money; and the application so far as it seeks to restrain the defendants from dealing with the land and houses, must fail. Chan. Div., April 25, 26, 1890. *Lister* v. *Stubbs*. Opinion by Stirling, J. 62 L.T. Rep. (N.S.) 654.—*Albany Law Journal.*

ONE of the greatest characters at the Bombay Bar was a man named Anstey, very clever and equally eccentric. Many are the stories current about him here. Once, when a judge had, in his opinion, delayed too long in giving judgment in a case in which he was concerned, he moved the Court for a new trial. "But, Mr. Anstey," said his Lordship, "I have not yet given judgment. How can you move for a new trial?" "Quite so, me Lud," replied Anstey, "but the case was tried so long ago that you Ludship must have forgotten all about it, and it's quite right that it was tried over again to refresh your Ludship's memory." The eccentric motion had its desired effect, and judgment was given very shortly afterwards.

Another yarn of Inverarity. Once at the close of a trial, the judge said: "That decides the case, Mr. Inverarity, and there now only remains the question of costs to be argued." "*Only*, me Lud!" replied Inverarity; "costs are the one thing that are worth fighting about.'—*Jurist.*

DIARY FOR NOVEMBER.

1. Sat.....All Saints' Day. Sir Matthew Hale born, 1609. Last day for filing papers and fees for final examination.
2. Sun.....*22nd Sunday after Trinity.* O'Connor, J., Q.B. D., died, 1887.
7. Fri .....Battle of Tippecanoe.
9. Sun.....*23rd Sunday after Trinity.* Prince of Wales born, 1841.
11. Tues ....Court of Appeal sits. Battle of Chrysler's Farm, 1813.
12. Wed.....W. B. Richards, 10th C.J. of Q.B., 1868. J. H. Hagarty, 12th C.J. of Q.B., 1878.
14. Fri. .....Falconbridge, J. Q.B.D., appointed 1887.
15. Sat.....Sir M. C. Cameron, J. Q.B., 1878. Macaulay, 1st C.J. of C.P., 1849.
16. Sun.....*24th Sunday after Trinity.* Erskine died 1823, æt. 73.
17. Mon.....Mich. Term commences. High Court Just. Q. B. & C.P.D. Sittings.
19. Wed.....Armour, J., gaz. C.J. Q.B.D., 1887. Galt, J., gaz. C.J. C.P.D., 1887.
21. Fri .....J. Elmsley, 2nd C.J. of Q.B., 1796. Princess Royal born, 1840.
22. Sat.....Lord Clive, 1774.
23. Sun.....*25th Sunday after Trinity.*
25. Tues ....Marquis of Lorne, Governor-General, 1878.
30. Sun.....*Advent Sunday.* St. Andrews. Moss, J.A., appointed C.J. of Appeal, 1877. Street, J. Q.B.D., and McMahon, J. C.P.D., appointed 1887.

Reports.

UNITED STATES.

ILLINOIS SUPREME COURT.

HEALEY *v.* MUTUAL ACC. ASS'N.

Insurance—Accident—Death by poison.

Death resulting from the accidental taking of poison creates a liability under a policy insuring against death caused by "external, violent, and accidental means."

[June 12.

Appeal from Appellate Court, First District. Action by Emma T. Healey against the Mutual Accident Association of the North-West upon a certificate of membership in favor of her deceased husband, John Healey, by which he was insured against death occasioned by "external, violent, and accidental means." The Circuit Court gave judgment for defendant on demurrer to the declaration, and the Appellate Court affirmed the judgment. Plaintiff appeals.

Miller, Leman & Chase, for appellant.

Albert H. Veeder and Mason B. Loomis, for appellee.

CRAIG, J.—The question presented, although one of pleading, involves a construction of the policy upon which the action was brought; and in placing a construction on the contract, and in arriving at the intention of the contracting parties, regard must be had to the object and purpose which was intended by the contracting parties. A policy of accident insurance is issued and accepted for the purpose of furnishing indemnity against accidents and death caused by accidental means, and the language of the policy must be construed with reference to the subject to which it is applied: *Insurance Co.* v. *Nelson*, 65 Ill. 420. Thus a provision in a policy against loss by fire avoiding the policy if the property becomes incumbered has been held not to include incumbrance by judgment, although within the terms used: *Baley* v. *Insurance Co.*, 80 N.Y. 21. Again, policies of insurance being signed by the insurer, the language employed being that of the insurer, the provisions of the policy are usually construed most favorably for the insured in case of doubt or uncertainty in its terms: *Insurance Co.* v. *Scammon*, 100 Ill. 664. "No rule in the interpretation of a policy is more fully established or more imperative and controlling than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity, which in making the insurance it was his object to secure. When the words are without violence susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted": May Ins. (2d ed.), sec. 175.

Keeping in view these well-settled rules of construction, the question to be determined is whether the death in this case is one falling within the spirit of the policy. The death of John Healey, the assured, is a conceded fact, but it is said the policy is an assurance against death by external, violent, and accidental means, and that death did not ensue from external, violent, and accidental means within the meaning of the policy. Under the averments of the first and second counts it is manifest that death ensued by accidental means, as it is expressly averred that death was produced by accidentally taking and drinking poison. The demurrer admits this averment of the declaration, and the fact that death ensued from accidental means stands admitted by the record. But to bring the case within the terms of the policy it devolved upon the plaintiff to aver and establish not only that death ensued from accidental means, but also from external and violent means. The next enquiry, therefore, to be determined is whether, within the meaning of

the policy, death resulted from external and violent means. While the authorities in cases similar to the case before us are not entirely harmonious, yet we think that the decided weight of authority is in support of the view that death in this case was caused by external and violent means. In *McGlinchey* v. *Casualty Co.*, 80 Me. 251, the insured was riding in a covered carriage. The horse became frightened and ran some distance before he could be controlled. In running, the horse came near collision with other teams, but no collision occurred, nor was the carriage upset or any one injured. However, immediately after the runaway, the insured became sick, and died in an hour after the accident. The question arose whether death was caused from bodily injuries through external, violent and accidental means within the meaning of the policy, and the court held that it was. In the case cited the body of the deceased bore no marks of physical injury, nor did the body come in contact with any physical object during the time of the accident, but death no doubt resulted from physical strain and mental shock. In *Insurance Co.* v. *Crandall*, 120 U.S. 527, it was held that an insane man who takes his own life dies from an injury produced by external, accidental and violent means. In the cases of *Trew* v. *Assurance Co.*, 5 Hurl. & N. 211, and on appeal 6 id. 839; 7 Jur. (N.S.) 878; *Reynolds* v. *Insurance Co.*, 22 Law T. (N.S.) 820, and *Winspear* v. *Insurance Co.*, 42 id. 909; 43 id. 459; affirmed 6 Q.B.Div. 42, it was held that death from drowning was caused by external and violent means within the meaning of an accident policy. In the *Trew Case*, which may be regarded as a leading one on the subject, it is argued: "Whereas from the action of the water there is no external injury, death by the action of the water is not within the meaning of the policy." In reply to the argument the court said: "That argument, if carried to its extreme length, would apply to every case where death was immediate. If a man fell from the top of a house, or overboard from a ship, and was killed, or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be that policies of this kind in many cases where death resulted from accident would afford no protection whatever to the assured. We ought not to give those policies a construction which will defeat the protection of the assured in a large class of cases:" 6 Hurl. and N. 844. In *Paul* v. *Insurance Co.*, 112 N.Y. 472, the policy was substantially like the one in question here, indemnifying against injuries caused by external, violent and accidental means. The insured died from inhaling illuminating gas. He was stopping at a hotel in New York city. He was found dead in his bed, the room being filled with gas. When found the deceased lay on his bed like a man asleep, without any external or visible signs of injury upon his body. An action on the policy was sustained, and in disposing of the question whether the injuries were caused by external and violent means the court said: "As to the point raised by the appellant that the death was not caused by external and violent means within the meaning of the policy, we think it is a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause. The cases collated on the respondent's brief sufficiently establish that as a proposition: *Trew* v. *Insurance Co.*, 7 Jur. (N.S.) 878; *Reynolds* v. *Insurance Co.*, 22 Law T. (N.S.) 820; *McGlinchey* v. *Casualty Co.*, 14 Alt. Rep. 13." If, as held in the case last cited, death from inhaling poisonous gas is to be regarded as caused by external and violent means, upon the same principle death resulting from the accidental taking of poison must be regarded as resulting from external and violent means. Again, where a person is drowned, having been suffocated by the action of the water in the lungs, if a death in such a case is to be regarded as caused or produced by external and violent means, as held in the cases heretofore cited, for the same reason a similar rule must be applied where death resulted as alleged in this case. Here the death arose from accidentally taking and drinking poison, and we are constrained to hold, when such is the case, the injury resulting in death may be regarded as received through violent means. If a person should receive a gunshot wound in the body resulting in death, it would be conceded that death ensued from violent and external means. For a like reason poison taken into the stomach producing death may also be treated as an external, violent

means. Indeed we are inclined to concur with what was said by the Court of Appeals of New York in the case last cited, "that a death is the result of accident, or is unnatural, imports an external and violent agency as the cause." We have been cited to a few cases holding a different rule: *Hill* v. *Insurance Co.*, 22 Hun. 187. This case was overruled by the later case of *Paul* v. *Insurance Co.*, cited *supra*. *Pollock* v. *Association*, 102 Penn. St. 230, is a case sustaining the position of the defendant. But while we recognize the high ability of the court in which the case was decided, we are not disposed to follow the rule there adopted. We think the rule established by the Court of Appeals of New York is better calculated to carry out the true intention of the parties where the contract of insurance was entered into, and one too more nearly in harmony with the current of authority bearing on the question. The judgment of the Appellant and Circuit Courts will be reversed, and the cause remanded to the Circuit Court for further proceedings in conformity to this opinion.

ONTARIO.

FOURTH DIVISION COURT, COUNTY OF ONTARIO.

WHITNEY *v.* WHITNEY & ROSE.

Mercantile Law Amendment Act—Payment by defendant's surety—Form of summons, order and execution.

A defendant who is surety for his co-defendant, but which does not appear upon the proceedings, is not entitled, as of course, to an order for execution against his co-defendant; but must issue and serve a summons upon his co-defendant and the plaintiff, setting forth the facts, and calling upon him to show cause why execution should not issue against such co-defendant as prayed. Form of such summons, judgment, and execution thereon.

[WHITBY, Nov. 8.

Application for leave to issue execution by a defendant against his co-defendant for whom, he alleges, he was only a surety, he having paid the judgment herein.

DARTNELL, JJ. This judgment is, on the face of the proceedings, paid and satisfied. To render a transcript to the County Court of any value, the right to execution and the facts must appear upon the proceedings in the the inferior Court. The other defendant and the plaintiff should have an opportunity of controverting the alleged facts. There must be a summons, in the nature of a "Summons to Revive," served upon him, and an adjudication that he is shown to be entitled to the benefit of "The Mercantile Law Amendment Act."

This was subsequently done, and the above facts duly proved.

The following forms were settled by the Judge.

SUMMONS—(Original style of cause.)

To the above named plaintiff, defendant.

Whereas, on the 28th day of May, 1889, the plaintiff recovered judgment against the defendant in the said Court, holden in and for the said division, for $ debt and $ costs; and whereas execution upon the said judgment was duly issued and the defendent, E.R., has paid and satisfied the same; and whereas the said E.R. was surety only for his co-defendant, A.W., and as such is entitled to the benefit of sections 2 and 3 of "The Mercantile Law Amendment Act," and to have execution issued against his co-defendant; and whereas by an instrument in writing, dated the day of 1889, the said plaintiff did assign and transfer to the defendant, E.R., the said judgment and all his right, title, and interest therein; you, the defendant, A.W., and you the above named plaintiff, are hereby summoned to appear at the sittings of this Court, to be held on the 20th day of November, 1889, to show cause, if any you have, why the said defendant, E.R., should not have execution of the said judgment against you and the said A.R., to be levied of you the said A.W., and, in the event of your not appearing, judgment will be entered against you by default.

ORDER.—(Endorsed upon summons to revive.) The plaintiff and the defendent W., having been duly served with the within summons, and the facts alleged therein having been proved to my satisfaction, I do order that this cause be, and the same is hereby revived in the name of E.R., as plaintiff, and the said A.W., as defendant, and let execution issue against the said A.W. in favor of the said E.R.

EXECUTION.—(Style of cause)—(as revived.) Whereas, on the day of , 1889, one, A.W., duly recovered in said Court, holden in and for said division, judgment against the above named plaintiff and defendant for $ for debt and $ for costs of suit, which has been satisfied by the plaintiff, who was surety

for the defendant; and whereas, the said action was on the day of 1889, revived by order of the Judge of this Court, in the name of E.R. as plaintiff, and A.W. as defendant, with power to issue execution against the said A.W.,

You are hereby required to levy of the goods and chattels of the defendant in this county (not exempt from execution) the said moneys, amounting together to the sum of $ and your lawful fees; so that you may have the same within thirty days from the date hereof, and pay the same over to the Clerk of the Court for the plaintiff. Given etc.

T. W. Chapple, Uxbridge, for the applicant.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

From STREET, J.] [Oct. 3.

IN RE FLATT AND THE UNITED COUNTIES OF PRESCOTT AND RUSSELL.

Municipal corporations — By-law — Petition — Freeholder — R.S.O. (1887), c. 184, s. 9.

By the term "freeholder" as used in R.S.O. (1887), c. 184, s. 9, is meant a person actually seized of an estate of freehold, legal or equitable, and it does not include persons in possession of land under contracts for the acquisition of the freehold thereof upon the fulfilment of certain conditions.

Judgment of STREET, J., reversed, MACLENNAN, J.A., dissenting.

G. F. Shepley, Q.C., and *J. Bicknell* for the appellants.

J. H. Ferguson, Q.C., and *J. B. O'Brian*, for the respondents.

WRIGHT *v.* BELL.

Will — Construction — Per stirpes or per capita — Trusts — Infant trustee — Disclaimer — Statute of Limitations.

A testator, who died in 1840, by his will, made in that year, devised all his property to certain persons as executors and trustees upon trust for the maintenance and support of his wife and unmarried daughters as long as they should continue unmarried and live with his widow, and then directed that "when my beloved wife shall have departed this life, and my daughters shall all have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money to the best advantage by sale thereof, and to divide the same equally among those of my said sons and daughters who may be then living, and the children of those of my said sons and daughters who may have departed this life previous thereto."

Held, reversing the judgment of FERGUSON, J., that the division must be per stirpes and not per capita.

One of the executors and trustees, a son of the testator, was fifteen years of age at the time of the testator's death. He did not, upon coming of age, apply for probate of the will, though when probate was granted to the other executors leave was reserved to him to so apply, nor did he act in the execution of the trusts. He did not, however, in any way disclaim, and he knew of the will. In 1861, with the knowledge and consent of the acting trustee, he went into possession of certain lands that had belonged to the testator in his lifetime, believing, as he said, that the lands had been devised to him, and he remained in possession thereof for twenty years until the period of conversion and distribution.

Held (BURTON, J.A., dissenting), affirming the judgment of FERGUSON, J., that he was in law necessarily affected with notice of the provisions of the will and of the express trust thereby created, and that he must be held to have entered as trustee and not tortiously, and could not invoke the Statute of Limitations.

McCarthy, Q.C., and *H. S. Osler*, for the appellant.

S. H. Blake, Q.C., *J. K. Kerr*, Q.C., *W. N. Miller*, Q.C., *J. Reeve*, Q.C., *Hoyles*, Q.C., *H. T. Beck*, and *A. H. F. Lefroy*, for the several respondents.

BALDWIN *v.* KINGSTONE.

Will — Construction — Heir-at-law — Change in law after will made — Primogeniture — Mistake — Laches — Acquiescence — Family arrangements — Tenants in common — Statute of Limitations.

A testator by his will, made on the 14th of August, 1850, devised certain land to his widow

for life, and after her death to two nephews, and in the case of the death of them or either of them in his own lifetime he devised the share of such deceased to the heir-at-law or heirs-at-law of such deceased, his heir or their heirs and assigns. The Act commonly known as the Act Abolishing Primogeniture, 14 and 15 Vict., c. 6, was passed on the 2nd of August, 1851, and came into force on the 1st of January, 1852. One nephew of the testator died in 1858, leaving him surviving two sons and two daughters. The testator died in 1866 and his widow in 1870.

Held (GALT, C.J., C.P., dissenting), affirming the judgment of ROBERTSON, J., 16 O.R., 341, that the Act abolishing primogeniture did not apply (1) because the will was made before it was passed or took effect, and (2) because the land had been lawfully devised by the person who died seized, and therefore that the eldest son of the deceased nephew, as his common-law heir, was entitled to the remainder in fee expectant upon the death of the widow.

Tylee v. *Deal*, 19 Gr., 601, approved.

Upon the death of the testator's widow the three surviving children of the deceased nephew (one daughter had died a short time before intestate and unmarried) entered into possession and enjoyment of the land in question under the belief that they were tenants in common of one undivided moiety thereof, the surviving nephew being entitled to the other undivided moiety. From time to time leases and sales of portions of the land were made, in which all parties joined, the instruments containing recitals as to the assumed tenancy in common, and the rents and proceeds of sales being divided among them in the proportion of one-half to the surviving nephew, and one-sixth to each of the others. In 1885 a partition deed was executed of the unsold portion. In 1886 the eldest son for the first time had brought to his attention the question of his title under the will, and this action was soon afterwards brought by him, asking that the title might be declared, the partition deed set aside, and the rents and proceeds of sales, received by the brother and sister, repaid to him.

Held, affirming the judgment of ROBERTSON, J., 16 O.R., 341, that as all parties had acted under a mistake as to, and in ignorance of, the true legal construction of the will, the plaintiff was not barred by laches or acquiesence as far as the land unsold was concerned, but that there could be no recovery back of the moneys actually received by the brother and sister.

Cooper v. *Phibbs*, L.R. 2, H.L. 170; *Earl Beauchamp* v. *Winn*, L.R. 6, H.L. 234; and *Rogers* v. *Ingham*, 3 Chy.D., 351, considered and followed.

Held, further, in this also affirming the judgment of ROBERTSON, J., 16 O.R., 341, that as there was no consideration therefor, and no compromise or settlement of any disputed question, the partition deed and other dealings could not be supported as in the nature of family arrangements.

Held, also (GALT, C.J., C.P., dissenting, reversing the judgment of ROBERTSON, J., 16 O.R., 341, that the eldest son having always received a share of the rents and profits of the undivided moiety was in law always in possession of the whole of that moiety, and therefore that no title had been acquired against him by the brother and sister under the Statute of Limitations.

Robinson, Q.C., and *H. Cassels*, for the appellant.

Irving, Q.C., *McCarthy*, Q.C., *Moss*, Q.C., *G. M. Evans*, and *W. Barwick*, for the several respondents.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Full Court.] [June 27.

REGINA *v.* MENARY.

Justices of the Peace—Summary conviction—Liquor License Act, R.S.O., c. 194—Offence against s. 49—Arrest in lieu of summons—Remand by one justice only—Powers of justices under s. 70—Distress warrant—Imprisonment upon non-payment of fine and costs—Admission of no distress—Costs of conveying to jail—Power to amend conviction—Evidence—Saving clause, s. 105.

The defendant was convicted before two justices of the peace for selling liquor without a license, contrary to s. 49 of the Liquor License Act, R.S.O., c. 194. A conviction was drawn up and filed with the clerk of the peace in which it was adjudged that the defendant should pay a fine and costs, and if they were

not paid forthwith, then, inasmuch as it had been made to appear on the admission of the defendant that he had no goods whereon to levy the sums imposed by distress, that he should be imprisoned for three months unless these sums and the costs and charges of conveying him to gaol should be sooner paid. An amended conviction was afterwards drawn up and filed, from which the parts relating to distress and the costs of conveying to gaol were omitted. A warrant of commitment directed the gaoler to receive the defendant and imprison him for three months, unless the said several sums and the costs of conveying him to gaol should be sooner paid.

Upon a motion to quash the convictions and warrant,

Held, that the mode adopted for bringing the defendant before the justices was not a ground for quashing the conviction; and *semble*, also, that it was not improper to arrest him instead of merely summoning him.

Held, also, that the fact that the defendant was remanded by only one justice could not affect the conviction.

Semble, that the justices had no power under R.S.O., c. 194, s. 70, to issue a distress warrant or to make the imprisonment imposed dependent upon the payment of the fine and costs; but as this objection was not taken by the defendant, no effect was given to it.

Held, also, that the justices had the right to draw up and return an amended conviction in a proper case.

Held, also, that if the justices were bound to issue a distress warrant, the insertion of the words relating to the admission of the defendant that he had no goods, was proper; and if they had no power to issue a distress warrant, these words were mere surplusage, and did not vitiate the conviction.

Held, also, that if the justices had no power to require the costs of conveying him to gaol to be paid by the defendant, the conviction was amendable, as and when it was amended; for the amendment was not of the adjudication of punishment.

Held, lastly, that having regard to s. 105 of R.S.O., c. 194, and to the evidence before the justices, the convictions and warrant should not be quashed.

Alan Cassels for the defendant.

Langton for the complainant.

Div'l Court.] [June 27.

EDMONDS *v.* HAMILTON PROVIDENT AND LOAN SOCIETY.

Mortgagor and mortgagee—Application of insurance moneys—Acceleration clause in mortgage—Election not to claim whole principal, R.S.O., c. 102, s. 4, s-s. 2—Interest, time of commencement—Mortgage account—Rectification of mortgage—Laches—Agreement—Local agent and appraiser, powers of—Wrongful sale under power in mortgage—Illegal distress—Measure of damages.

Upon a motion for an interim injunction the defendants filed an affidavit and statement showing that they had applied insurance moneys received by them, in respect of loss by fire of buildings upon land mortgaged to them by the plaintiffs, upon overdue instalments of principal, and an insurance premium paid by them; and in their statement of defence they also stated their position in a way inconsistent with that which they afterwards took, viz., that the insurance money was applicable upon the whole principal, which, by virtue of an acceleration clause in the mortgage had become due.

Held, that the defendants had made their election, so far as the effect of the default and the application of the insurance money was concerned, not to claim the whole principal as having become due by reason of the default; and that being so, that they must apply the insurance money, as required by R.S.O., c. 102, s. 4, s-s. 2, upon arrears of principal and interest.

Corham v. *Kingston*, 17 O.R. 432, approved and followed.

Interest can be claimed by mortgagees only from the time the money is actually paid out by them.

Method of taking a mortgage account shown.

Rectification of the mortgage deed as to the time of the first payment of principal was refused where it was sought by the mortgagors at a time when the payment in any event was long past due, and the mortgagees, without fraud, had acted upon the mortgage as executed, and without notice of the intention of the mortgagors to have the payment fixed for a later period; and where also there was really no agreement upon which to found the rectification, the defendants' local appraiser and agent to receive applications having no express or implied authority to make such agreements.

For wrongful proceedings under power of sale in a mortgage, illegal distress upon chattels, and consequent wrongs,

Held, that the plaintiffs were entitled to recover more than their mere money loss.

P. C. Macnee for the plaintiffs.

Crerar, Q.C., for the defendants.

BOYD, C.] [Oct. 11.

TREMEEAR *v.* LAWRENCE.

Solicitor's lien—Costs of actions to restrain sale of estate—Lien upon estate in hands of assignee—Absence of fund upon which lien could attach—Costs.

Two actions were brought by a trader to restrain proceedings under a chattel mortgage against the trader's stock of goods, and interlocutory injunctions were granted, but the actions were not carried further. The chattel mortgagee brought an action to recover the mortgage money and to restrain the mortgagor from selling the goods, whereupon the latter made an assignment for creditors, and, by arrangement in that action, the goods were sold by the assignee, and payment was made in full to the mortgagee for debt, interest, and costs of that action, after notice and without objection on the part of any of the creditors or of the solicitor who conducted the actions brought by the trader.

The solicitor claimed that by his exertions in these actions he had saved the goods from being sacrificed by summary sale, and brought this action to have it declared that he was entitled to a preferential lien upon the estate in the hands of the assignee for costs.

Held, that even if it were shewn that stopping the sale under the mortgage were a benefit to the estate, there was no jurisdiction without the direction of a statute to charge the property recovered or preserved, and without a money fund there was no subject for a lien.

Costs as of a successful demurrer only were allowed to the defendant.

Colin McDougall, Q.C., for the plaintiff.

Shepley, Q.C., for the defendant.

Chancery Division.

Full Court.] [Sept. 4.

MCCLURE *v.* BLACK.

Patent to land—Locatee receipt—Fraudulent locatee—Statute of Limitations—R.S.O., 1887, c. 24, s. 16.

The plaintiff, in 1855, obtained from the Commissioner of Crown Lands a receipt on sale of a certain lot of land. In 1868, one Beaton, in whose possession this receipt was, handed it back to the Crown Lands Office, and by means of fraud procured his own name to be substituted as purchaser in the books of the Department; and he and those claiming under him, including the defendant, had remained in possession of the lot ever since. In 1872, the plaintiff, having learned of the imposition, applied to the Department for redress. This application was pending and undisposed of by the Commissioner of Crown Lands till March 14th, 1889, when it was ordered that the patent should issue to the defendant; but three months were allowed to the plaintiff to take proceedings in Court to establish his title.

Held, that the plaintiff's right of action was not barred by any Statute of Limitations.

Per BOYD, C. The case might be likened to a matter litigated in the proper forum wherein no decision is given till after the lapse of years; in which case, pending judgment, the Statute of Limitations cannot operate to vest or divest rights, but must be deemed suspended.

W. Cassels, Q.C., for the defendant.

O'Connor, Q.C., for the plaintiff.

Full Court.] [Sept. 4.

SAWYER ET AL. *v.* PRINGLE.

Vendor and purchaser—Property not passing till full payment—Resuming possession—Action for balance of purchase money after resale.

Sawyer & Co. sold to the defendant a traction engine and separator under a written agreement whereby it was provided that the defendant should give three promissory notes for the price; and that in default of payment of any of the notes the whole price should become payable; and that no property should pass to the defendant on the machine until the whole price was paid; and the vendors might resume possession on default, or for other good cause.

Default occurring, the vendors resumed possession, and resold the machine; and after crediting on the notes what the machine brought on the resale they now sued the defendant for the balance of the notes.

Held, per BOYD, C., that they had a right so to do; for the agreement gave a right of action

for the full price upon default in payment, and a concurrent right to resume possession of the machine. The mere fact of selling the machine had not any other effect than to fix the value of the machine as deteriorated by the defendant's use of it.

Held, per ROBERTSON, J., that the plaintiffs had no right to recover. By resuming possession they to all intents put an end to the contract. They were not necessarily bound to assume that position ; they could have sued on the promissory notes, and left the possession in the defendant ; but having elected to resume possession they had no cause of action for whatever may be due on the purchase money.

Hoyles, Q.C., and *Chisholm* for the plaintiffs.

J. M. Clark for the defendants.

Full Court.] [Sept. 6.

ATTORNEY-GENERAL DOMINION *v.* ATTORNEY-GENERAL ONTARIO.

Constitutional Law—Validity of 51 Vict., c. 5—Lieutenant-Governor—Pardoning power.

Held, that the Act of the Ontario Legislature, 51 Vict., c. 5, being an Act respecting the executive administration of the laws of this Province, is *intra vires*.

Per BOYD, C. No change is aimed at by the Act in the office of Lieutenant-Governor as such ; but rather important and congruous functions are sought to be added thereto, to be administered by that chief public officer by whom, through the Dominion, the Province is connected with the Queen. As to section 2, relating to the pardoning power, the power to pass laws implies necessarily the power to execute or to suspend the execution of these laws, else the concession of self-government in domestic affairs is a delusion. Sovereign power is a unity, and though distributed in different channels and under different names it must be politically and organically identical throughout the empire. The local legislature which creates the offence has power to suspend the sentence, to commute or remit the punishment. The royal prerogative in its large sense as exercisable in reference to crime, this Statute does not purport to interfere with. It may be classified as one made in relation to the imposition of punishment ; or from another point of view as one for the administration of justice in the Province.

C. Robinson, Q.C., and *Lefroy*, for the Attorney-General of the Dominion.

E. Blake, Q.C., and *Æ. Irving*, Q.C., for the Attorney-General of Ontario.

Div'l Ct.] [Oct. 18.

CENTRAL BANK OF CANADA *v.* GARLAND.

Banks and banking—Discount of promissory notes—Right of bank to recover accessory securities.

A tradesman sold goods to customers, taking promissory notes for the price and also hire receipts by which the property remained in him till full payment was made. The notes were discounted through the medium of a third person by the plaintiffs, who were made aware when the line of discount was opened of the course of dealing and of the securities held. They were not, however, put in actual possession of the securities, and there was no express contract in regard to them. In an action to recover the securities or their proceeds from the assignee for creditors of the tradesman,

Held, that the securities were accessory to the debt ; that in equity the transfer of the notes was a transfer of the securities; that the defendant was in no higher position than his assignor, and could not resist the claim to have the receipts accompany the notes ; and that it was not material that the relation of assignor and assignee did not immediately exist between the tradesman and the plaintiffs.

W. R. Meredith, Q.C., for plaintiffs.

Watson, Q.C., and *Masten*, for defendants.

FALCONBRIDGE, J.] [Aug. 19.

BAIN *v.* ÆTNA LIFE INSURANCE CO.

Insurance — Life — Endowment participating plan—Right of insured to profits—Divisible surplus—Discretion of actuary and directors —Statements of company in letters and pamphlets.

The plaintiff insured with the defendants upon their endowment participating plan, and by the contract of insurance the defendants agreed to pay him at the end of a specified period, if he survived, a certain sum, together with his share of the profits made in that branch of the business during the period.

The plaintiff, being dissatisfied with the share allotted to him, claimed an account and payment of his share of all the profits. The defendants claimed the right to hold a portion of their apparent surplus to ensure the future stability of the company.

Held, that the plaintiff was bound to acquiesce in the discretion of the actuary and directors of the company, *bona fide* exercised, and to take his share of what was apportioned as divisible surplus; and that being so that his case was not advanced by statements made by officers of the company in letters or pamphlets as to the course pursued by them in dividing the surplus.

Laidlaw, Q.C., for plaintiff.

S. H. Blake, Q.C., and *J. J. Maclaren*, Q.C., for defendants.

MACMAHON, J.] [July 15.

GORDON *v.* PROCTOR.

Estoppel—Fraudulent preference — Mortgagee attacking title of mortgagor.

Held, that an assignee of a mortgage is not estopped as such from attacking the conveyance to the mortgagor as fraudulent and void while, nevertheless, maintaining his mortgage as a valid encumbrance.

Clute for the plaintiff.

Osler, Q.C., and *J. W. Kerr* for the defendants Proctor and Hagerman.

Watson for the defendants W. and J. Leary.

Riddell for the defendants Christopher Leary and Edmison.

BOYD, C.] [Sept. 27.

HALL *v.* HOGG.

Mechanics' lien—Material men—Time for registering claim—R.S.O., c. 126, s. 21.

Merchants supplied materials to the contractor for certain buildings and claimed a lien under the Mechanics' Lien Act in respect thereof. There was no contract for the placing of these materials upon the property; the last of them were bought by the contractor from the merchants on the 22nd November, and were by him placed in the building on the 23rd November.

Held, that the time for registering the claim of lien, under s. 21 of the Act, R.S.O., c. 126, began to run from the 22nd November.

J. A. Macdonald for plaintiffs.

Bain, Q.C., for defendant, Howland.

Practice.

FERGUSON, J.] [Oct. 9.

HEASLIP *v.* HEASLIP.

Costs—Taxation—Appeal to Master under Rule 854—Order upon appeal—Further appeal from order to Judge—Appeal from certificate of taxing officer—Costs between solicitor and client.

An appeal by the defendant in an action of alimony from the certificate of a taxing officer, upon taxation of the plaintiff's costs of the action and reference between solicitor and client, as directed by the judgment.

Pending the taxation there was an appeal by the plaintiff to the Master in Chambers under Rule 854, upon which the Master made an order allowing the appeal. The taxing officer in his certificate simply followed the order of the Master, and the present appeal was in respect only of the items in question before the Master. The order of the Master was not appealed from and the time for appealing from it had elapsed.

Held, that the appeal under Rule 854 should be looked upon as an intermediate thing and advisory in character, and that the defendant was not precluded from appealing from the certificate of the taxing officer because he did not appeal from the order of the Master.

Re Nelson, 13 P.R. 30, followed.

Re Monteith, 11 P.R. 361, distinguished.

Held, also, that where costs have to be paid by the opposite party and not by the client, there is no difference between "costs as between solicitor and client," and "costs between solicitor and client"; both mean costs between party and party, to be taxed as between solicitor and client; and that the plaintiff was entitled to tax against the defendant under the words of the judgment only such costs as a solicitor can tax against a resisting client under the general retainer only to prosecute or defend the action; but that the taxation should be as liberal as possible, under the practice, in favor of the plaintiff.

Cousineau v. *City of London Fire Ins. Co.*, 12 P.R. 513, followed.

A. Hoskin, Q.C., for the defendants.

C. Millar for the plaintiff.

FERGUSON, J.] [Oct. 14.

SANVIDGE *v.* IRELAND.

Solicitor's lien—Settlement of action by parties without intervention of solicitors—Order for costs—Notice before money paid—Notice to solicitor instead of party personally.

Where a compromise of the action has been effected between the parties without the intervention of the solicitors, in order to entitle the plaintiff's solicitor to enforce his lien for costs upon the fruits of the litigation, by means of an order upon the defendant, collusion must be shewn, or the act complained of must have been done after notice from the solicitor complaining. And where parties made such a compromise, and the plaintiff's solicitor gave notice to the defendant's solicitor, after the agreement but before payment of the money agreed upon,

Held, that this was sufficient notice.

Tytler for the plaintiff's solicitor.

J. A. Macdonald for defendant.

BOYD, C.] [Oct. 16.

AYERST *v.* MCCLEAN.

Parties—Action of foreclosure—Mortgage made after 11th March, 1879—Wife of Mortgagor—Dower.

The wife of a mortgagor who has joined in a mortgage, made after 11th March, 1879, only for the purpose of barring her dower, is properly made a defendant to an action of foreclosure, in order that she may either redeem or protect her interest by asking for a sale; and being so made a defendant, and submitting to a foreclosure, no question could arise as to her dower being effectually extinguished. If the mortgage is before the Dower Act of 1879, the case is governed by the former law; therefore, the date of the mortgage is material, not that of the marriage.

Report of *Re Hewish*, 17 O.R., at p. 457, corrected.

T. R. Ferguson for the plaintiff.

Pepler, Q.C., for defendant Margaret McClean.

Law Students' Department.

EXAMINATION BEFORE TRINITY TERM: 1890.

CALL.

Harris—Broom—Blackstone.

Examiner: R. E. KINGSFORD.

1. If a passenger buys a ticket from the G. T. Railway from T. to B., via the N. Y. C. Railway, and is injured on the N.Y.C. Railway by the negligence of that company, against whom could he recover damages? Why?

2. If from the negligent manufacture of fireworks a bystander looking on at a pyrotechnic display is injured, could he recover against the manufacturer? Why?

3. In an action for malicious prosecution, what power has the jury in regard to inferring want of reasonable and probable cause from the fact of malice?

4. By what evidence of provocation may the charge of murder be reduced to manslaughter?

5. Of what crime would a man be guilty who should break into another's dwelling house at night for the purpose of getting some chattels belonging to himself?

6. When will coercion of the husband be a sufficient excuse for the wife on a criminal charge?

7. What is the main distinction in regard to the remedy in a case where a magistrate acts without jurisdiction, and a case where he acts erroneously within his jurisdiction?

8. What is the legal right of the owner of surface soil to the support of adjacent mineral soil owned by another party?

9. When can a party injured by the violation of a statutory duty, with or without a penalty attached for violation, recover damages therefor?

10. A statute is passed which without directly saying so, in effect repeals a prior statute. In the next session an amendment is made to the first statute as if it were still in existence. What is the effect?

Contracts—Evidence—Statutes.

Examiner: R. E. KINGSFORD.

1. A. is a creditor; B. principal debtor; C. the surety. A. gives time to B. C. knows that A. does so, but there is no reservation of the rights of A. against C. What is the effect as regards C.?

2. By an unlawful agreement money is to be paid over. Subsequently, by agreement, securities for the payment are taken in lieu of the money. How far are they valid?

3. On a sale by sample of goods, what is the effect if the sample had a defect in manufacture not known to the parties?

4. A. means to sell goods to B. & Co. C. gets the goods from A. by falsely representing himself as a member of the firm, and authorized to act for them. How far will a sale or pledge by C. of the goods be valid as against A.?

5. Where a document is partly favorable to a party, and partly unfavorable, how far is the document admissible as evidence?

6. How far do interlineations or alterations vitiate a document as evidence.

7. In case of conflicting presumptions, which class prevail? Give instances.

8. What are the limits as to the right to compel a witness to answer degrading questions?

9. What are the advantages of direct over presumptive evidence, and of presumptive evidence over direct evidence?

10. A payment of part in discharge of the whole of a debt is made in a foreign country where acceptance of such payment has the effect of a release. What effect would such payment have in Ontario, where it is not valid?

Real Property and Wills.

Examiner: P. H. DRAYTON.

1. A., about to marry B., instructs his solictor to prepare a draft settlement of certain property on B. Before final approval, settlement was abandoned on A.'s verbal promise that he would forthwith execute a will, leaving the property to B., which accordingly was executed immediately after the marriage; it was subsequently revoked. State whether or not such would amount to part performance to take agreement out of the statute. Reasons.

2. What is the meaning of the words "die without issue" in wills before the Wills Act, and what its meaning now?

3. A. makes a deed of a lot and house in Toronto to B., who puts it in his vault, not registering it. Sometime after he registers it; in the meantime *fi. fa.* lands against lands of A. have been placed in the sheriff's hands. How is B.'s property affected?

4. A mortgagor dies after 1st July, 1886, intestate. How, if in any way, can the mortgagee realize on his mortgage, the same being in default where no letters of administration are taken out?

5. Is there any distinction between sales of real estate for taxes, and sales of real estate under sheriff's execution, with regard to dower?

6. What is the rule with regard to payment of interest on purchase money (1) in cases where there is express stipulation in agreement for payment of interest; (2) where it is silent on the same?

7. A. enters into a contract with B. to sell him a house in Belleville belonging to him. He writes B., "will sell you my house in Belleville for $5,000;" B. replies, "will agree to purchase at figure named." Give your opinion as to the liability in a suit of specific performance by either party in such a case, with reasons.

8. Why are wills required to be registered?

9. What provision, if any, is there under the Devolution of Estates Act as to the affidavits of value to be made by an administrator seeking for letters of administration?

10. State the law with regard to crops as between vendor and vendee when agreement is silent as to same.

Equity.

Examiner: P. H. DRAYTON.

1. A. and B. are partners in a mercantile business. Both partners have private property. Executions are placed in the sheriff's hands by both firm creditors and private creditors. The whole of the assets are insufficient to satisfy such executions. How will they rank upon the respective properties?

2. What relief will a Court of Equity grant in the (*a*) non-execution of a power; (*b*) the defective execution of a power; (*c*) the non-execution of a trust; (*d*) the defective execution of a trust?

3. What provision is there as to summary applications in cases of alleged fraudulent conveyances?

4. A., an express trustee, in breach of his trust conveys a portion of the trust estate to a purchaser for value without notice. Ten years elapse when he (A.) purchases the same, and claims to hold it as his own. His former *cestui que trust* brings an action for its recovery. A. defends the same, relying on the Statute of Limitations, and the fact of his having bought from a purchaser for value without notice. Who should succeed, and why?

5. Where there has been partial failure of the purposes for which conversion is directed, what distinction, if any, is there as to the application of the doctrine to cases where it is directed by by deed, and where it is directed by will?

6. State the general law in respect of copyrights in books, and in case of maps and charts. What would you consider as conclusive evidence that the one was a copy of the other in the absence of direct evidence?

7. A. is a patent medicine vendor; B. is an employee of his, and as such obtains the secret ingredients of a non-patented medicine; he leaves his master and proceeds to manufacture and sell the medicine. A. seeks to have him restrained by injunction. Can he succeed? Explain.

8. Explain the principle on which Courts of Equity proceed in decreeing specific performance.

9. State generally the effect of conditions annexed to gifts and legacies in restraint of marriage. Illustrate by examples.

10. What are the rules which have been adopted by the Court in respect of resulting trusts in gifts to charities?

The Canada Law Journal.

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THE Bench of the United States has suffered a great loss by the death of Mr. Justice Miller of the Supreme Court. Although he did not enter law until his thirty-second year, he showed that he had found, at that comparatively late period, the avocation for which he was pre-eminently fitted. With a natural aptitude for law, he quickly discerned and decided on, in his own mind, the real issues of a case; and with a great practical experience of constitutional questions, he has left an imprint on the jurisprudence of that country which time will not readily efface.

THE Land Titles Act is being firmly established in Manitoba, and the day of the old registration system is past. Even now a considerable part of the province, and the larger portion of the more densely settled districts, has come under this Act. The new soil appears to be more congenial to this species of "titles" than the soil of our older province. We do not, of course, mean that the possibilities are equal in each province, but undoubtedly the Land Titles Act has thrived in the Province of Manitoba to a degree that it will take many years to attain with us.

We alluded in our last number to the disadvantages our brethren there were laboring under in matters of practice, and now we hear that the promised revision of the statutes will be a consolidation only. As it is ten years since the last revision, this announcement will cause much regret. It is considered by many in our own Province, that the benefit that would accrue to the profession by a quinquennial revision of our statutes would more than justify the expense. A similar improvement would seem applicable to Manitoba.

A PECULIAR motion for an injunction was made recently before the Superior Court at Indianapolis. The plaintiffs, two young Democratic lawyers of that city, are seeking to restrain their landlady from compelling them to vacate their room in her house. They allege that they cannot find another boarding-house in the precinct; that if they move they will lose their votes; and that their landlady, who is aware of this, is a Republican; and that, having no other cause of complaint against them, her only object in ordering them to leave is that they may be deprived of their suffrage at the ensuing election. The injunction was granted until trial. In this country where, fortunately for us, party feeling does not run quite so high, the rule *de minimis non curat lex* would probably apply to such a case, notwithstanding the value and importance of a vote; for

even under *The Judicature Act* (under which some surprising things are done), we doubt whether any of our Courts could be found to say that it is either "just or convenient" to compel a boarding-house keeper, against her will, to keep boarders under her roof for an indefinite time.

AMONG recent decisions of practical interest to the profession may be mentioned the deliverance of the Chancellor *In re Graydon & Hammill*, which was an application under the "Vendors and Purchasers' Act," in which an important point of real property law was decided, contrary, we believe, to what has been the common opinion current in the profession. The question was whether future accruing instalments of local improvement taxes are incumbrances which a vendor selling "free from incumbrances" is bound to remove. The late case of *Cumberland* v. *Kearns*, 17 Ont. App., 281, had established that where the vendor had himself joined in the petition for the improvements in respect of which the taxes were imposed, such taxes constituted an incumbrance within his covenant against incumbrances, which he was bound to remove. *Re Graydon & Hammill* carries the law a step further, and according to this case, even though the vendor has not in any way participated in the proceedings which have resulted in the imposition of the local improvement tax, it is nevertheless an incumbrance, which he. in ordinary course, is bound to pay or commute, unless he has, by his conditions of sale, protected himself from the liability. Sellers of city property, where local improvement by-laws are in force, will therefore have need to take warning and be careful to protect themselves by special conditions of sale, if they wish to escape liability to commute local improvement taxes on the property they may offer for sale.

AN old and esteemed friend of THE CANADA LAW JOURNAL, and one for whose judgment we have the greatest respect, calls in question the justice of our remarks in a recent issue on the cases of *Robertson* v. *Grant* and *Hall* v. *Prittie*, and thinks that, after all, there may be no conflict between the two cases. He suggests that an element may have existed in *Robertson* v. *Grant* which was wanting in *Hall* v. *Prittie*, viz., that the letter in the former case may have directed payment out of a particular fund; whereas, in the latter case, the direction was simply to charge the payment to the creditor, without designating the fund out of which the order was to be satisfied. We are inclined to think the point may possibly be well taken. Unfortunately the case of *Robertson* v. *Grant* is very meagrely reported, and the exact words of the letter, which was there held to constitute an equitable assignment, are not stated. In order, if possible, to clear up the point, we have endeavored to see the original papers in that case, but find that the letter was merely produced as an exhibit, and was not filed; and on application to the solicitors who produced it, they were unable to find the papers in the case, and believe they have been destroyed. Our efforts were therefore unavailing. Whatever may have been the form of the letter in *Robertson*

v. *Grant*, and whether the decision in that case does or does not in fact conflict with the recent decision of the Court of Appeal in *Hall* v. *Prittie*, 17 Ont. App., 306, we think it is quite plain that the latter, at all events, is in entire conformity with the well-settled principle of law: that in order to constitute a good equitable assignment, there must be a specific designation of the fund intended to be affected; and although, as Lord Hardwicke said in the leading case of *Row* v. *Dawson*, 1 Ves. Sr., 332, in order to constitute a good equitable assignment of a *chose in action*, "any words will do, no particular words being necessary thereto," yet the words employed must at least clearly indicate the *chose in action* intended to be assigned; or to use the words of Sir John Leach, V.C., in *Watson* v. *Duke of Wellington*, 1 Russ & My., 602, "in order to constitute an equitable assignment there must be an engagement to pay out of a particular fund"(p.605). The authorities are too numerous and too unanimous on this point to leave any room for doubt.

MEETING OF THE COUNTY JUDGES.

The seventeenth annual meeting of the County Judges of Ontario was held last June, but no official report of the proceedings was published.

These meetings, which are held annually at the expense of the Judges themselves, are productive of much good; and, while there are doubtless many and sufficient reasons why full reports of these meetings should not be made public, there were on this occasion, as on others, some matters discussed of general interest, which we have obtained leave to refer to, and to mention the conclusions arrived at by the Judges then present.

At the request of the Inspector of Legal Offices, a discussion took place regarding various questions relating to the Surrogate Court.

In reference to the practice of having a separate order approving of the Bond in Administration matters, it was considered that one order might be made to embrace the approval of the Bond and the grant of letters of Administration.

As to whether a charge should be made for the order for inventory, the conclusion was reached that the order was expedient and proper, and that it should direct that a full inventory be filed within sixty days. It was also considered that the words, "Of or about the value of," etc., used in the present affidavit of value, were too vague.

It was thought that orders requiring only trifling alterations should not be charged for; a very sensible conclusion, which possibly may enable certain of the "deceased," who would like to take their worldly goods with them, to rest more easily in their six feet of freehold.

The Judges were of the opinion that the Registrar is only bound to prepare papers when brought in by the parties themselves, or where the amount is under $400.00; in all other cases the papers for Probate should be presented through a solicitor, since the preparation and proof leading to Probate and Grant, being often difficult and important, should not be entrusted to incompetent or irresponsible persons.

Attention was called to the incongruity between the present form of Probate, which refers only to personal estate, and the "Devolution of Estates Act," but no action was taken.

It was suggested that the practice relating to guardianship applications should be more clearly defined, and that a form of affidavit should be prepared setting forth the facts in the petition, such as date of death, names, ages and places of residence of infants, value of property, etc.

In reference to the preparation of papers by the Surrogate Clerk above referred to, an opinion was advanced that the item of $1.00 for "preparing" the papers did not necessarily involve the "drawing up" the necessary papers leading to Grant, for the Registrar is entitled to the same fee even when the papers are drawn up and presented by solicitors; but that it was meant to cover a fee for examining the proofs, preliminary to their being laid before the Surrogate Judge.

A question was asked relative to Division Court procedure, as to whether a Judge of the Division Court, in a jury case, under section 146, or the Court of Appeal, under section 152 of the Division Courts Act, can enter a verdict or judgment in direct opposition to the finding of a jury on a material issue. The Judges were of opinion that the right to the verdict, as pronounced by a jury in the Division Court, is an absolute one, and no party can be deprived of the benefit of the finding. (*Lewis* v. *Ord*, 17 O.R., 610.) The sections might apply if special findings were left to a jury, and an erroneous judgment entered upon such findings.

Notes on Exchanges and Legal Scrap Book.

MIXED COURTS.—Dissatisfaction is felt at present in England at the delay involved in the trial of commercial causes in the ordinary courts, and with the difficulties besetting the trial of actions for the satisfactory decision of which any special mercantile knowledge is required. It has been suggested that a way out of the difficulty would be found in the establishment of courts similar in some respects to the tribunals of commerce which have worked so satisfactorily in countries on the continent of Europe. In line with this suggestion a bill has been introduced into the House of Commons for the establishment of district courts, each composed of a county court judge, and two merchant judges, and local courts composed of merchant judges, with a registrar as legal assessor. The bill provides for no appeal other than to a tribunal for that purpose stationed at London. The idea is to make the procedure of the proposed courts as simple as possible, and to avoid the delays which hedge about proceedings in the ordinary courts, as well as to provide a class of judges specially acquainted with mercantile questions. What the prospects are for the enactment of this legislation has not yet been made apparent.—*Bradstreet's.*

MR. MONTAGU WILLIAMS is reported to have recently laid down that wedding presents cannot be recovered back by the giver from the receiver in the event of the wedding in view of which they were given not taking place. This may seem very hard in some cases, as where family jewels or other heirlooms have been presented, or where the receiver breaks off the marriage without any cause whatever just before the day appointed for it. But whether hard or not, is it good law? We very much doubt it. Lord Hardwicke in *Robinson* v. *Cumming*, 2 Atk. 409, laid down that "if a person has made his addresses to a lady for some time, upon a view of marriage, and upon reasonable expectation of success makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him; but where presents are made only to introduce a person to a woman's acquaintance, and by means thereof to gain her favor, such person is to be looked upon only in the light of an adventurer, and like all other adventurers, if he will run risks, and loses by the attempt, he must take it for his pains." As the defendent in *Robinson* v. *Cumming* was an adventurer, and was not allowed to have his presents back, we have only an *obiter dictum* here, but it is an *obiter dictum* of great weight, and we incline to the opinion that an action would lie to recover presents given in expectation of a marriage which did not take place, as for a gift upon a condition subsequently unfulfilled.—*Law Journal.*

FORFEITURE OF LEASE.—A recent case in the Queen's Bench Division, *Kirkland* v. *Briancourt*, is instructive on the subject of waiver of forfeiture. Certain premises were held under an agreement at a yearly rent of £65, payable quarterly. The agreement contained a very usual stipulation that the lessor should have the right to re-enter the premises if the whole or any part of a quarter's rent should remain unpaid for twenty-one days after any one of the usual quarter-days, and should not be paid when subsequently demanded by letter. On January 16th a letter was sent to the defendant requiring payment of the rent due the previous Christmas. Later in the same month a distress was put in, by which part of the sum owing was recovered. Early in February an action was brought for the balance of rent, and for the possession of the premises. The tenancy was held to be forfeited by the provisions of the agreement, but the question then came in as to whether the distress was not in itself a waiver of the forfeiture, as it was made after the period at which the right to determine the tenancy had accrued to the plaintiff. A statute of Queen Anne gives a landlord the right to distrain at any time within six months of the termination of a tenancy, but former decisions show that this Act applies only where the tenancy is determined in the ordinary course, and not by a forfeiture. If a landlord distrains upon a person who has hitherto been in the position of his tenant, the distress is a recognition that he is so stilll, and is consequently a waiver of the forfeiture of non-payment due before the distress was made. Therefore the plaintiff lost his action of ejectment, but obtained judgment for the balance of rent owing to him, without costs, however. From this it appears that a person

who is desirous of enforcing the forfeiture of a tenancy must be careful not to distrain on his tenant's goods after he has acquired the right of re-entry, as such a distress is a distinct waiver of the forfeiture and replaces the parties in their original position of landlord and tenant under the agreement.—*Irish Paper.*

CONTRADICTORY STATUTES.—The question, What is the rule of construction to be adopted if two contradictory statutes should receive the royal assent on the same day? is one of very great interest. We think the right view is that the two contradictory enactments cancel one another, and we are confirmed in this opinion by a reference to 33 Geo. III., c. 13, by which "the clerk of the parliaments shall indorse on every Act," immediately after the title, "the day, month, and year when the same shall have passed, and shall have received the royal assent, and such indorsement shall be taken to be a part of such Act, *and to be the date of its commencement,* where no other commencement shall be therein provided." The other view, that a Court could take judicial notice of the order in which the royal assent was given, has in support of it the cases in which exceptions have been allowed (see *Clarke* v. *Bradlaugh*, 51 Law J. Rep. Q. B. 1; L. R. 8 Q. B. Div. 63) to the rule, that the law takes no account of the fraction of a day; but it has been expressly held that an Act becomes law as soon as the day of its date commences, so that a child born before the royal assent was given to an Act would have the benefit of it: *Tomlinson* v. *Bullock*, 48 Law J. Rep. M. C. 95; L. R. 4 Q. B. Div. 230; and this points to the royal assent fixing one and the same minute for the commencement of all the Acts receiving the royal assent on the same day. On the lists, of course, of bills awaiting the royal assent they must be separately distinguished, but they could not be numbered in chapters until after the royal assent had been given, for of any given number of contemporaneous bills *non constat* (in law) that all will be assented to by Her Majesty. Therefore a conflict, if it exists, must result in cancellation; but the rule (see "Maxwell on Statutes," 2nd ed. p. 186) that "the language of every enactment must be so construed, as far as possible, as to be consistent with every other which it does not in express terms modify or repeal," will, of course, apply with extra force to two contemporaneous enactments.—*Law Journal.*

MOOT COURTS AND LEGAL EDUCATION—In view of the Moot Courts recently established in connection with the Law School, a few words containing some practical ideas, suggested by a "Moot" at the University of Melbourne, may be of interest. Our friends at the antipodes, while a little behind us perhaps in this matter, are evidently nevertheless fully aware of the practical importance of a knowledge of pleading and evidence being acquired by students of the law. The following is from the *Australian Law Times*:—"So much has been said about the education of the legal profession at the University lately on various branches of law, and so many changes have been made in the curriculum with the view and hope of making perfect lawyers out of raw students, that it is refreshing to observe that

a piece of practical work has been done which will enable the student lawyer to become a useful advocate. We allude to the 'Moot' which was held last week in the law-courts at the suggestion of Professor Jenks of the Melbourne University. We have always contended that a real and proper examination as to the qualifications of a lawyer should be something like that which is demanded of the medical student before he is allowed to operate on the world at large. A medical student here, before he gets his degree, has to go through a course of practical work, such as anatomy, dissection and clinical lectures, the performance of which actually means that he has done while a student exactly similar work to that of the practising physician or surgeon. Can the same be said of the solicitor or barrister? Is it not a fact that the average efficiency of the fledgling solicitor or barrister is far less at the beginning of his professional career than that of any class correspondingly placed? We think the answer must be in the affirmative. And the result of this unsatisfactory state of things is, as regards the barrister at all events, that he has to wait as a rule a good number of years before he is allowed to do anything of much importance in the conduct of a case in court, and when the wished for opportunity does come, he finds rather late in the day that he has to learn the real business of his profession by conducting a case perhaps at considerable risk to the unfortunate client. All the law in the world is worth very little if one cannot use it, and use it in the very nick of time, so that, may be, an all important piece of evidence may not be rejected, or improperly admitted through inadvertence, the advocate discovering just too late that he has allowed his client to be improperly put out of court. It is for this reason we hail with satisfaction the installation of the Moot Court by Professor Jenks and hope that it may become a permanent and regular institution. . . . . The late Lord Lytton remarks in one of his essays that the first requisite of an orator is a sound pair of lungs, and the legend runs that the first studies of Demosthenes were devoted to curing himself of stuttering: we may go a step further than that, and assuming the tyro to have the first of these qualifications and to be able 'to speak the speech trippingly,' we may then confidently recommend him both to practise before the Moot as frequently as he may be suffered, and also to attend the most important trials of Nisi Prius, imagine himself briefed on one side and mentally take a witness through his evidence, cross-examine others, take proper legal objections, and argue with the judge, all of course *sub silentio;* and, when the last witness is finished, address an actual living jury in a fine imaginary speech. If he can do this fairly to his own satisfaction in imagination, he will have gone a long journey on the road to successful advocacy when he dons wig and gown for a real client with a real brief, and with guineas marked thereon which are to be paid."

REVOCATION OF WILLS BY CUTTING OR ERASURE.—A belief that a person could not wholly disinherit his children led to the trite phrase "to cut him off with a shilling." In the case of goods of Dinah Leach, the testatrix said that she had "cut G. out of her will." This was no figurative phrase, implying

simply that she had revoked a legacy previously given by her will to G., as she literally cut the name of G., whom she had appointed as an executor, out of the will with a pair of scissors. The testatrix, it seems, was G.'s mother-in-law, and some disagreement had taken place between G. and his wife. Mr. Justice Butt held that there had been only a partial revocation, and that the will was entitled to probate in the form in which was found at the testatrix's death. It would have been better for G. if his name had never been in the will at all, as, though notice had been given to him by direction of the judge, he was not allowed his costs on the application for probate. In the Goods of Maley, 57 L.T., Rep. N.S., 500, 12 P.Div., 134, the facts were somewhat similar. A testator appointed C. and M. trustees and executors of his will, and gave a legacy to C. if he should act as trustee. The testator and C. quarrelled, and legal proceedings took place between them. The former told a friend that he had cut "that rascal C." out of his will with a pair of scissors, and on his death it was discovered that the portion relating to appointment of executors and the legacy to C. had been cut off, the cut-off piece being found in the bag containing the will. The president expressed his opinion that by cutting out this part of the will the testator had revoked the legacy to C. and the appointment of executors. In the Goods of Henrietta Morton, 57 L.T., Rep. N.S. 501, 12 P.Div., 141, the testatrix erased, apparently with a penknife, the signatures of herself and the attesting witnesses. Mr. Justice Butt said, "I have no doubt about this case. When a person sets to work to scratch out he actually cuts away the paper. What this testatrix did may be regarded as a literal cutting out. The paper is not pierced, but the signatures are scratched away. I think the will has been revoked." On the other hand, a subsequent erasure of their own initials by the witnesses to the will of a dying man was held by the president to be no revocation in *Margery and Layard* v. *Robinson*, 57 L.T., Rep. N.S. 281, 12 P.Div., 8. In that case the witnesses, having duly attested a card on which the wishes of the testator, elicited from him with some difficulty, were written, thought that they had undertaken too great a responsibility, and erased their initials, telling the testator that they did not consider it a will, but only a memorandum. They said that the testator gave signs of assent to all this. The distinction between an erasure by the testator and by the witnesses is obvious, as the former has the power to revoke the will, the latter have not. Sir James Hannen, in delivering judgment, said: "Whether they (*i.e.*, the witnesses) thought it to be a valid will or a memorandum is immaterial. The function of witnesses to a will is simply to authenticate the testator's signature, and, this being done, their opinions or beliefs or intentions are irrelevant. I am further of opinion that the subsequent erasing of attestation by the witnesses is immaterial." His lordship, however, pronounced against the card on the ground that that the testator's mark was in the middle of the will instead of "at the foot or end thereof." In the Goods of Gosling, 11 P.Div., 79, the testator obliterated the whole of a codicil, including his own signature, and the subscription of the attesting witnesses, by means of thick black ink marks, and wrote at the bottom of it, signed by himself and two witnesses, the words "we are witnesses to the erasure of the

above." The effect of the obliteration, if it had stood alone, was not considered, as the words below the codicil were held to be words declaring an intention to revoke within the 20th section of the Wills Act. "If a testament was in the custody of the testator, and upon his death it is found among his repositories mutilated or defaced, the testator himself is to be presumed to have done the act; and it has already appeared that the law further presumes that he did it *animo revocandi*." That proposition, laid down in Mr. Justice Williams' standard work on Executors, 8th ed., vol. 1, p. 160, received the sanction of Lord Penzance in *Bell* v. *Fothergill*, 23 L.T., Rep. N.S. 323, L. Rep. 2 P. & D., 148, where the testator appears to have repented of his revocation of the will, and to have gummed on the signature which he had previously cut off. His lordship held that the will had been revoked by the cutting, and that the subsequent gumming on was not sufficient to revive it.—*Law Times.*

CURIOUS WILLS.—W. D. Foster, the dramatic company promoter, would have no woman present at his funeral, says the London *Standard*. If his wife survived him, he would be cremated; otherwise he would be buried in the ordinary way. One of the strangest cases occurred in France a few months ago. M. Travers, declaring the French to be "a nation of dastards and fools," left his fortune to the poor of London, and further ordered that his body should be launched into the sea a mile from the English coast. An attempt was made to declare this unpatriotic Frenchman insane, but the Court of Appeals upheld the will.

Frenchmen always have been more inclined to frivolity than we are in the disposal of their estates. One bright specimen actually provided that a new cooking recipe should be pasted on his tomb each day. There was more force, however, in the frivolity of the French lawyer who left $10,000 to a local madhouse, declaring that it was simply an act of restitution to his clients. For sheer levity no will of the last two years compares with that of the rich American, a cousin of the Vanderbilts, who left every dollar he possessed to a girl he used to watch in the theatre. He did not even know her, and the only reason he gave for the strange freak was that her turned-up nose amused him.

Another American gentleman, Horatio G. Onderdonk, has of late enjoyed an elaborate joke at the expense of his heirs. There was a good estate and many expectant relatives; but deep was their dismay when it was found that no one could benefit under the will who did not reach an almost unattainable exaltation of life. No one could so benefit who was an idler, a sluggard, a profligate, a drunkard, or a gambler. The use of liquor and tobacco would deprive a legatee of his portion. He was also debarred from entering any bar-room or porterhouse, from getting married before the age of twenty-five, or even from not having risen, breakfasted, and got ready for business by nine o'clock in the morning. We have not heard if any heir has claimed, or if the money is still unappropriated, like the letter which still lies in an American post-office, addressed to "A Christian, Chicago."

An American young lady exhibited a depth of sentiment rarely equalled when she directed in her will that tobacco should be planted over her grave, that the weed, nourished by her dust, might be smoked by her bereaved lovers.

Cremation clauses are now becoming common, but these appear only in the wills of advanced and strong-minded people. Other provisions are made by nervous people, moved chiefly by the dread of being buried alive. This was the case with John Blount Price, a justice of the peace of Islington, whose will was recently published. Mr. Price declared in his will that, four days after death, two skillful surgeons were to be paid five pounds each to perform such an operation on his body as would prevent the possibility of his coming to life in his coffin.

The Viscount de Carros Lima, who threatened his heirs with the loss of their property if they buried him in the family vault, further enjoined on them to have his body watched until decomposition set in. A similar provision was made by Dennis Crofton, an Irish gentleman, last year. One Vienna millionaire was so anxious about his corpse that he would not let it be left in the dark. Not only did he provide for the vault to be lighted by electricity, but he also ordered the coffin to be so illuminated, science thus coming in a gruesome fashion to the aid of security.

Lord Newborough claimed by will the peculiar privilege of being twice buried. His remains are now finally laid at rest in Bardsey Island, off the Welsh coast; but to the dead peer's honor be it said that the strictest economy was enjoined in his obsequies, and the house-keeper at Bonveau, who watched his every glance, received a legacy of £5,000 and an annuity of $600 a year.

The "waiting will" is a constant source of irritation. The professors of Vienna University were delighted to learn this year that Count Hardegg had left their institution £50,000; but when it came out that the money was to accumulate for one hundred years, by which time it would have increased to $18,000,000, the wits decided that Count Hardegg should have been styled half-boiled. The most hard-headed business men occasionally like to keep their heirs waiting. Mr. McCalmont, the stock-broker, provided that his nephew, Captain McCalmont, must wait seven years for his inheritance of $30,000,000.

Perhaps the legatee, who has the least chance of realizing, is the one mentioned by a wicked Finn, who left all his property to the devil. Finland is now probably the only country where the devil is a land-owner. Some notice was taken at the time of the fact that the name of the legatee appeared in capital letters throughout the will. The inference was that the testator wished to make a good impression upon him, with an eye to securing indulgence when they met. Even the devil's name in the will is better than none, which has been the case with certain large properties this year and last.

A feature of the year has been the tendency of gentlemen to draw up wills in favor of ladies to whom they are engaged. Mr. Rawson, for instance, left all his property to Miss Vizetelly. In like manner a Miss Bessie Macdonald, a young lady of Glasgow, has become possessed of a handsome legacy and a hotel in New York, left to her by one who hoped to marry her.—*The Green Bag.*

THE COMPETENCY OF WITNESSES.—To advocates of legal reform, and to lovers of consistency, it must be a matter of regret that another parliamentary session has passed without any attempt being made to direct renewed attention to either of the Evidence Amendment Bills. These important schemes of practical reform, which a year or two ago attracted so much interest, still remain on the parliamentary shelf, and must be in some danger of getting dusty. That they will, by-and-by, be taken down, further considered, and finally moulded into law, no one need doubt. Moreover, the halting action of the legislature is quite in accord with the traditional treatment bestowed on proposals for removing the disabilities of witnesses. This remark applies not only to the primary eligibility of persons as witnesses, but also to the conditions upon which they are to be allowed to give evidence. The subject as a whole is of undeniable historic interest, and in its narrow aspect presents a most striking example of tardy legal evolution. It has been suggested, indeed, that from the familiar "oath" of the present day the student may travel back, step by step, to the superstitious ordeal of the dark ages, comprising as it did the various forms of test by red-hot iron, cold water, and even of "judicial pottage." So that, in one sense, the lady who goes into the witness-box in the Divorce Court to "deny on oath" the conduct imputed to her is merely doing in modern form what Queen Emma, mother of Edward the Confessor, did in another manner when she submitted herself to the ordeal of the nine red-hot ploughshares in the ancient city of Winchester.

The witness's oath remains now, as it formerly was, a religious asseveration by one who invokes the Supreme Being, and renounces all claim to His mercy and calls for the Divine vengeance if the evidence given shall be false. It is to be observed, however, that the words "so help me God" are no part of the oath itself, but simply indicate the customary manner of administering it. Less than seventy years ago the general rule was that every witness must be sworn in the common form, and if, from want of religious belief, or from scruples of conscience, a person was debarred from invoking the Deity, his evidence, however important, became absolutely inadmissible. The first measure of relief applied only to Quakers and Moravians, to whom was conceded the privilege of making a solemn affirmation instead of taking the oath in the usual manner. This exemption was made in 1833, and in the same year the Separatists obtained by statute a like indulgence, in order that they might be no longer "exposed to great losses in their trades and concerns," nor be subject to fines and imprisonment for refusing to aid litigants with their testimony under the old conditions. A few years later the Act 1 & 2 Vict. c. 105 enacted that a person shall be bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as the witness himself shall declare to be binding, subject, of course, to the like consequences as those occasioned by perjured evidence. Hence arose the admissibility of those curious forms and ceremonies adopted by the Chinese, Mahomedans, and others when called as witnesses in English courts of justice.

It became necessary, however, in course of time, to make a further inroad on the old harsh and exclusive rules to which the community had for hundreds of

years meekly submitted. It was found that there were many persons who objected from conscientious motives to be sworn as witnesses, but who were not entitled to the privileges conferred already on members of a few religious bodies. It was not until the year 1854 that such persons were authorised to make a solemn affirmation in civil actions. Later on the like permission was extended to those who gave evidence in the Probate and Divorce Court; but, strange as it may seem, it was not until the year 1861 that a similar enactment was passed with respect to evidence in criminal cases. Even then atheists still remained outside the category of eligible witnesses. Hence the Act passed in 1869, which provided a form of solemn promise and declaration for any person objecting, or objected to as incompetent, to take the oath "provided the presiding judge is satisfied" that the oath would have no binding effect upon the witness's conscience. The unfortunate adoption of the phrase "presiding judge" defeated to some extent the object of the Act. It was found that the whole ground was not covered by the statute, and, accordingly, an amending Act was passed in the following year.

The final step in the process of legal evolution thus briefly sketched may be said to have been attained by the passing of the Oaths Act, 1888, the provisions of which are, of course, familiar to lawyers. No less gradual and tentative has been the operation of removing in part the disqualifications which formerly attached to various persons on the ground of crime or of interest. It is needless to trace this emancipation through its various stages, which may be said to have commenced when the County Courts were established (and parties and their wives in actions for small debts were made competent witnesses in their own causes), and to have terminated, as yet, with the passing of the Criminal Law Amendment Act, 1885. The last-mentioned Act, besides making prisoners charged with the commission of specified offences eligible to give sworn testimony in their own behalf, provides that where in a case under the Act any child of tender years who is called as a witness does not, in the opinion of the Court, understand the nature of an oath, her unsworn testimony may be admitted if the child appears sufficiently intelligent to understand the duty of speaking the truth, and provided such evidence is materially corroborated. Various other Acts might be mentioned by which exceptions have been made to the general rule that accused persons shall be debarred from giving evidence in their own behalf; but the Criminal Law Amendment Act unquestionably affected a far larger class than had been touched, or has since been relieved, by other statutes of the realm. The Act of 1885 created in fact a new departure of a really bold character, and, in the opinion of most persons whose experience commands respect, the experiment has been fully justified. In such a matter there can be no such thing as going back. The result of the tests thus gradually made must have served to encourage those who contend that the prisoner, or the defendant, in every case should be allowed to be examined as a witness in his own defence; and until the law makes provision to that effect it must be regarded as anomalous and incomplete.—*Law Times.*

THE MICROSCOPE AND THE CAMERA IN THE DETECTION OF FORGERY.—The subject of this paper is one of great practical importance in the administration of justice; and while not undertaking to treat the subject exhaustively, we shall endeavor to give some points which may be of value in subsequent cases.

The modes of committing forgery are various: (1) By alteration of the document in question, which may consist (*a*) of an erasure or erasures; (*b*) of additions to the instrument; (*c*) of both erasures and additions. (2) By the forgery of the entire writing, or of the signature. This may be accomplished in several methods:—(*a*) by tracing a fraudulent signature over a genuine signature by means of the pen or pencil; and (*b*) by copying or imitating the genuine signature otherwise than by tracing.

The methods of detecting frauds thus committed are various, according to the nature of the fraud:

First: Composite Photography has been proposed as a means of determining the authorship of disputed documents. While this method seems to be founded on correct scientific principles, yet in our opinion the cases in which it may be applied in practice will be very few, if any. In order to apply this method for the identification of a writing, whose authenticity is questioned, very much more material is required than is usually available in any case presented in court. As a rule, questions of authenticity arise principally with reference to disputed signatures; and under the rules of evidence applicable in England and in most of the States, it is very difficult, if not impossible, to procure other similar signatures, as a means of identification; and without a very considerable number of similar signatures, this method can not be adopted. Moreover, the difficulties of technique are such as to render it impracticable in the hands of an ordinary observer.

Second: Another means of identifying the authorship of a document is that proposed by Prof. T. C. Mendenhall, and published, I believe, in *Science* some years since. This method consists in what may be styled "Curves of Literary Style," the co-ordinates of which, if I remember correctly, consist of the number of words and the number of syllables which they respectively contain. This method, although very interesting and probably of considerable scientific value in cases to which it is applicable, is not, in the opinion of the writer, of any practical value in the ordinary administration of justice as cases are presented for adjudication in court; for the reason that it requires vastly more material than is ever accessible in ordinary practice.

Third: The ordinary method of identifying writing in use in courts of justice is that styled "Comparison of Hands." In this connection a brief review of the rules of law applicable to this case may not be inappropriate. By the English common law, a witness is competent to testify respecting the genuineness of a disputed writing—(1) If he has seen the party alleged to have made the writing in question, write; and it is sufficient for this purpose that the witness has seen him write but once, and then only his name. (2) The second mode of acquiring knowledge of the handwriting of another is by the receipt from such person of written communications purporting to be in his handwriting, either in the usual

course of business or in reply to letters written by the witness, provided such communications have been acted upon as genuine by the parties, or adopted as such in the regular course of business. (3) Another method is by means of the comparison of the specimen in question with fairly selected, undisputed specimens of the alleged handwriting. With respect to this third method, there is considerable conflict of authority. By the English common law such comparison was permitted in two cases—(*a*) where the writings in question are of such antiquity that living witnesses can not be had, and yet are not so old as to prove themselves. Here the course is to produce other documents, either admitted to be genuine or proved to have been respected, treated and acted upon as such by the parties, and to call experts to compare them and to testify their opinion concerning the genuineness of the instrument in question. (*b*) Where other writings admitted to be genuine are already in the case.

Considerable diversity of practice at present prevails in England and in the various States of the Union; this diversity has been brought about partly by statutory enactment, and partly by decisions of the courts. Without undertaking to go into the details of the subject, we may state that in the State of Illinois the English rule is applied with some strictness, and excluding the case of ancient documents, the only case, as we understand it, in which a comparison of hands by experts is permitted, is where other writings admitted or proved to be genuine are properly in evidence and pertinent to the case: *Brobston* v. *Cahill* (1872), 64 Ills. 356, in which the rule laid down in *Jumpertz* v. *The People* (1859), 21 Id. 408, is explained and qualified. See also in general, 1 Greenleaf on Evidence, Sec. 577 *et seq.*; Chamberlayne's Best on Evidence, Sec. 232 and Note; Rogers on Expert Testimony, Sec. 139, 140 *et seq.*

With reference to this third method, by comparison of hands, two cases arise —First, where the material upon which the judgment is based consists of the disputed and genuine signatures; and, second, where the material at hand consists of a letter or letters, or other documents more voluminous. In the former case, the judgment arrived at does not, of course, possess the same weight as where more material is at hand upon which to form a judgment; nevertheless, cases do arise in which the expert is warranted, upon a comparison of the signatures, in expressing a very clear opinion that the signatures were or were not made by the same person.

As to the method of arriving at an opinion upon the comparison of one or more other signatures, the cases are so diverse that no general rules can be laid down. Each case must be decided upon its own particular facts.

In the second case, not unfrequently a conclusion can be arrived at having a high degree of probability amounting almost to a moral certainty. In arriving at a conclusion, many things are to be considered—not only is the form of the letters important, but their manner of combination to form words is even more important. The use of capitals, punctuation, mode of dividing into paragraphs, of making erasures and interlineations, idiomatic expressions, orthography, mechanical construction, style of combination, and other evidences of habit, are important elements upon which to form a judgment. An interesting case of this

kind occurred in the Greenwich County Court; the party denied most positively that a certain receipt was in his handwriting. It read: "Received the Hole of the above." Upon being asked to write a sentence containing the word "whole," he took pains to disguise his hand; but used the above phonetic style of spelling, even writing the capital "H"; and then he ran away to escape prosecution for perjury: Roger's Expert Testimony, Sec. 146; Taylor on Evidence, Sec. 1669. Note: I Greenleaf on Evidence, Sec. 581, Note.

Some years since, two anonymous letters, together with a number of letters written by several different persons, and the minutes of a scientific meeting written by a party not suspected of being the author of the anonymous letters, were submitted to the writer for his opinion. A careful study of the documents led the writer to the conclusion that the anonymous letters were written by the writer of the minutes above referred to; this conclusion was so much at variance with the opinion of the party who submitted the documents for examination that he was disposed to reject it. The writer, however, persisted in his opinion, and upon confronting the supposed author of the anonymous letters with the opinion, and accusing him of the authorship of said anonymous letters, he broke down and acknowledged himself to be their author. In this case, while the form of the letters in the several documents was not by any means identical, yet the manner of combining the several letters to form the more common particles, such as "the," "and," "of," "to," "for," etc., was identical in every instance, thus demonstrating to the mind of the writer the identity of their authorship.

Perfect identity of two signatures is very strong, if not conclusive, evidence of fraud. No two autograph signatures by the same hand will be exactly alike. In the famous Howland Will case, Professor Pierce, at that time professor of Mathematics in Harvard University, testified that the odds were 2,866,000,000,000,000,000,000,000 to 1 that an individual could not with a pen write his name three times so exactly as were the three alleged signatures of Sylvia Ann Howland, the alleged testatrix of the will and two codicils. If, therefore, upon superposition against the light, two signatures exactly coincide, it is morally certain that one of them is forgery.

(4) Another means of detecting forgery is by the internal evidences of fraud, afforded by the writing itself, with or without the aid of comparison with other and genuine writing.

These internal evidences may consist of alterations, such as erasures, additions, etc., above described, or of tracings of the genuine signature by means of a pen or pencil, which tracings are afterwards inked over with a pen; or they may be found in a copy of a genuine signature otherwise than by tracing in the several manners above described. The copy or imitation of the genuine signature may be either freehand or composite, by which latter is meant that the signature is made discontinuously or by piece meal. The detection of frauds attempted in the manner first above described is comparatively easy. A very low power of the microscope will readily reveal the erasures, and not unfrequently the word erased may be made out. When the signature has been traced over a genuine signature,

usually the forger will be found to have failed to entirely cover the original tracings, the character of which, by the aid of a low power, can usually be satisfactorily made out. In this case, also, the signature will usually be found to be discontinuous, and the places where the pen has been put upon and removed from the paper, in endeavoring to cover up the original tracings, can be readily made out, and when thus made out this fact is strong, if not conclusive, evidence of fraud. When the signature has not been traced, but is composite, or made by piece meal, in the manner above described, this can almost always be satisfactorily made out by the use of a low power, and when this composite character is so made out, it is likewise strong, if not conclusive, evidence of fraud. Not unfrequently, by the aid of the microscope, it can be determined that alterations of the instrument were made with a different pen and with different ink; and, not unfrequently, the order in point of time in which they were made can likewise be determined. In questions of this sort, and in general in cases of disputed signatures, photography is of very great service. In the comparison of disputed signatures, the writing in question should, if possible, be compared with the original and not with a photographic copy, such copy being considered by most courts as secondary evidence; nevertheless, photographic enlargements of genuine and disputed signatures, the correctness of which is established by testimony, are very useful as a means of illustrating the evidence of the expert. Not unfrequently also, by the aid of photography, differences in ink may be made out which are insensible to ordinary observation. . . . .—*American Law Register.*

Reviews and Notices of Books

The Veto Power—Its Origin, Development, and Function, in the Government of the United States. By E. C. Mason, A.B. Boston: Ginn & Co., 1890.

This volume, the first of a series of historical monographs, is issued from the University of Harvard, where the author is Instructor of Political Economy. The origin of the veto power is traced back and is shown to be a remnant of the legislative power once held by the English sovereigns, and in time transferred to the chief executives of the American colonies, and finally included in the Constitution of the United States. The disappearance of the use of the power was gradual, and its exercise by Queen Anne, in the year 1708, is the last instance in English history in which the sovereign has directly refused assent to a bill passed by both Houses of Parliament. The history of the veto power in the Federal and the various state governments is enlarged upon, and interesting statistics of the bills vetoed, and the Presidents who exercised the power, are given. The many constitutional points and features involved are dwelt upon at length, but in such a way as to concentrate the interest of the reader.

DIARY FOR NOVEMBER.

1. Sat.....All Saints' Day. Sir Matthew Hale born, 1609. Last day for filing papers and fees for final examination.
2. Sun.....*22nd Sunday after Trinity.* O'Connor, J., Q.B. D., died, 1887.
7. Fri .....Battle of Tippecanoe.
9. Sun.....*23rd Sunday after Trinity.* Prince of Wales born, 1841.
11. Tues ....Court of Appeal sits. Battle of Chrysler's Farm, 1813.
12. Wed.....W. B. Richards, 10th C.J. of Q.B., 1868. J. H. Hagarty, 12th C J. of Q.B., 1878.
14. Fri .....Falconbridge, J. Q.B.D., appointed 1887.
15. Sat.....Sir M. C. Cameron, J. Q.B., 1878. Macaulay, 1st C.J. of C.P., 1849.
16. Sun.....*24th Sunday after Trinity.* Erskine died 1823, æt. 73.
17. Mon.....Mich. Term commences. High Court Just. Q. B. & C.P.D. Sittings.
19. Wed.....Armour, J., gaz. C.J. Q.B.D., 1887. Galt, J., gaz. C.J. C.P.D., 1887.
21. Fri .....J. Elmsley, 2nd C.J. of Q.B., 1796. Princess Royal born, 1840.
22. Sat.....Lord Clive, 1774.
23. Sun.....*25th Sunday after Trinity.*
25. Tues ....Marquis of Lorne, Governor-General, 1878.
30. Sun.....*Advent Sunday.* St. Andrews. Moss, J.A., appointed C.J. of Appeal, 1877. Street, J. Q.B.D., and McMahon, J. C.P.D., appointed 1887.

Reports.

ONTARIO.

COUNTY COURT, COUNTY OF YORK.

[Reported for THE CANADA LAW JOURNAL]

ABELL *v.* NICOL.

Creditors' Relief Act—Execution Creditors—Interpleader—Scheme of Distribution.

Certain execution creditors had contested a claim under a Bill of Sale successfully. The Bargainee, though his Bill of Sale covered goods which were sold by the sheriff for $1,734, had offered upon the motion for an interpleader issue to abandon all claims to the goods if his alleged *bona fide* claim for $380, and some small costs of taking possession were paid by the attacking creditors. This offer was refused and the creditors succeeded in getting the Bill of Sale set aside. The sheriff prepared a scheme of distribution, allotting the whole $1,734 amongst the execution creditors, plaintiffs in the interpleader issue only, omitting any dividend to two subsequent execution creditors.

Held (1), That looking to the object of the Creditors' Relief Act, to make an equitable distribution of the debtor's assets amongst all the execution creditors, a subsequent creditor who had lodged his execution in time should rank on the fund—first deducting the sum of $400 and the solicitor and client costs of the contesting creditors—this sum being the real claim of the Bargainee, and the actual amount saved to the creditors by the litigation. The sheriff's scheme directed to be remodelled upon this view.

Held (2), That in attachment proceedings, under the Absconding Debtors' Act, the sheriff should make his statutory entry under Sec. 4, Creditors' Relief Act, forthwith after any final order for distribution (which order in this case was made at the close of the interpleader proceedings), and not at the expiration of six months from the date of the issue of the first writ of attachment. The sheriff had made his entry at this latter date.

Held (3), That a subsequent creditor who had proved his claim within thirty days from such date, and more than thirty days from the date of the order for distribution, could not be allowed to rank on the fund—the sheriff's wrong entry could not be urged to support such claim. *Semble:* If a creditor fears that he cannot prove his claim within the proper time, he should apply to the Court under Sec. 27 of the Absconding Debtors' Act for an order to extend the time for distribution.

On February 27th, 1890, a writ of attachment issued against the debtor, David Nicol, at the suit of one Monkman, and was duly placed in the hands of the Sheriff of York, who seized the goods of the debtor thereunder.

On March 18th one Rennie obtained a judgment against Nicol, and placed his execution in the sheriff's hands. Prior to this one W. H. Muckle claimed a part of the goods (seized under the attachment) by virtue of a bill of sale made to him by the debtor; and an interpleader order was made by the Master on March 21st, which directed the claimant's right to the goods covered by the bill of sale to be tried. Other parties, amongst them Abell, had served notice of claims to certain goods seized by the sheriff, these goods being manufactured articles, the property of these latter claimants under alleged hire receipts. The attaching and execution creditors declined to contest the title of these latter articles, and the interpleader order as to these claims directed the goods to be delivered up to the claimants. The sheriff, by the said order, was directed to sell the goods covered by the claim of Muckle under his bill of sale, and to hold the proceeds of the sale to abide the further order of the Court. The goods sold realized $1,734.

On April 11th, one John Nicol obtained a judgment and placed an execution in the sheriff's hands for the amount thereof. The attaching creditor, Monkman, obtained his judgment on April 13th, and on May 2nd placed his writ of execution in the sheriff's hands. The interpleader issue, delivered on April 1st, contained the names of Monkman (the attaching creditor), Rennie & Co., execution creditors, and John Nicol, who at that time had not obtained his judgment, but who joined in the proceedings.

On May 5th the interpleader issue was tried, and judgment pronounced in favor of the plaintiffs (at that date the only execution creditors), and on the same day the execution debtor made

an assignment for the benefit of creditors, and delivered the same to the sheriff.

On June 16th a final order in the interpleader proceedings was made, directing the sheriff to distribute the monies in his hands amongst the parties entitled. On July 11th, John Abell, who contested the sheriff's proposed scheme of distribution, obtained a judgment, and on July 14th placed his execution in the sheriff's hands. On July 28th the sheriff made the usual entry in his books under the Creditors' Relief Act.

On August 6th one John VanNostrand obtained a judgment, and placed his execution in the sheriff's hands. On August 28th the sheriff served his scheme of distribution, by which he divided the amount realized from the proceeds of the goods sold under the interpleader order, amongst the plaintiffs only; in those proceedings ignoring the claims of John Abell and John VanNostrand, two creditors who had executions in hands at the date of his preparing his scheme of distribution, and which writs came into his hands within a month after he had made the entry in his book under Sec. 4 of the Creditors' Relief Act. These latter two creditors claimed to be entitled to rank rateably on these monies or on a part of them.

R. J. Maclennan for plaintiff.

R. Boultbee for attaching creditor.

Mercer for Rennie.

Duncan for John Nicol.

F. Eddis for VanNostrand.

No one appeared for defendant.

MCDOUGALL, Co. J.—It appears that Muckle, the claimant, admitted in his affidavit making his claim, that he only held the bill of sale (upon the goods the subject of interpleader) as security for the payment of $380.09, and stated in this affidavit that upon the payment to him of that amount and his costs of taking possession of these goods, he would abandon all claims to the goods. His claim as to this or any amount was held to be invalid upon the trial of the interpleader issue. Abell and VanNostrand, in their claim to reform the sheriff's scheme of distribution, contend to be ranked only upon the balance of the monies realized by the interpleader proceedings, after deducting this $380.09 and any unpaid costs incurred by the plaintiffs in contesting Muckle's claim. They say this was the whole sum obtained as the fruits of the interpleader proceedings. They say Muckle claimed no more, and had he succeeded in his issue that is the only sum with his costs that he could have lawfully demanded from the sheriff out of the proceeds of the sale of the goods covered by his bill of sale. On the other hand, it is strongly urged that Muckle was supporting his bill of sale, and that had he succeeded in maintaining its validity, he was entitled to the whole proceeds of the sale of the goods covered by it. The interpleader order itself expressly directed that "the question to be tried should be whether at the time of the seizure by the sheriff the goods seized were the property of the claimant as against the attaching and execution creditors," and from this it is contended that the whole value of the goods seized were secured to the estate by the plaintiffs in the interpleader proceedings contesting successfully Muckle's claim, and that only those creditors who joined in those proceedings should share in the division of the monies arising therefrom.

Strictly speaking, the title to the whole of the goods covered by the bill of sale were in question, and had the value been only about $400 there would be no dispute now; but having realized $1,734 at the sheriff's sale the question now arises, was this amount saved to the estate by the interpleader proceedings? Muckle only claimed to have a claim for $380 and some charges for possession, and had the creditors consented to his being paid this amount, Muckle expressly waived all claim to any balance.

Looking at the intention of the Act to effect an equitable division of the debtor's assets amongst all his creditors, and yet by s-s. 3 of s. 4 to protect fully any creditors who run risk in undertaking legal proceedings to contest unjust claims, I think I am justified in holding that any surplus after deducting the true amount of Muckles claim, $380, his costs of possession, say $20 more (though nothing appears on the papers before me to fix the sum), and any costs (including solicitor and client costs) incurred by the plaintiffs in contesting Muckle's claim beyond costs realized from Muckle himself, should be distributed between the other creditors who placed executions or filed claims under the Creditors' Relief Act before the 19th of July. I fix this date because I think under 51 Vict., c. 11, s. 1 (Ont.), the sheriff should have made his entry forthwith after the final order of distribution, made by the Master, on the 18th of June. S. 22 of the Creditors' Relief Act, when it says

that the estate shall be realized under the provisions of the Absconding Debtors' Act, would cover, in my opinion, the sale of the goods and chattels under s. 20 of that Act, which sale was made in this case by order of the Court. The distribution must then take place under the provisions of the Creditors' Relief Act, as directed by s. 22 of that Act. 51 Vict., c. 11, s. 1, removes any doubts as to when the statutory entry should be made where there are interpleader proceedings.

The only section of the Absconding Debtors' Act which creates any difficulty in upholding this opinion is s. 26, which says that "if the property and effects of the absconding debtor are insufficient to satisfy the executions and other claims certified, none shall be allowed to share unless their proceedings under this Act or the Creditors' Relief Act, or the provisions of the Division Courts Act respecting absconding debtors, were commenced within six months from the date of the first writ of attachment."

In *Macfie* v. *Pearson*, 8 Ont., 746, Mr. Justice ROSE held that this provision as to six months was in effect repealed by 46 Vict., c. 6 (s. 4, I presume). This section is now in the consolidation s. 20 of the Absconding Debtors' Act. The revisors have chosen, however, to leave the six months section above quoted as being still in force (section 26 in the Consolidated Act), notwithstanding the expression of opinion in *Macfie* v. *Pearson*. That this decision must have attracted the attention of the Legislature is, I think, manifest by the passing of 49 Vict., c. 16, s. 36 (now section 22 of the Creditors' Relief Act). By that section it is expressly directed what shall be done where proceedings are commenced under the Absconding Debtors' Act either before or after the placing of an execution in the sheriff's hands. It is necessary therefore to reconcile the conflicting provisions of section 22 of the Creditors' Relief Act and sections 20 and 26 of the Absconding Debtors' Act, and s. 1 of c. 11, 51 Vict., a somewhat difficult task—but it would appear to me that where the sale of goods attached is made under the powers contained in section 20 of the Absconding Debtors' Act, and interpleader proceedings, as here, have been instituted and terminated by a final order directing distribution, any creditor desiring to come in to share in the distribution must commence his proceedings within thirty days from the date of the sheriff's entry, which should be made, as I have said above, forthwith after the order for distribution, and if such creditor cannot secure his judgment and execution or certificate within thirty days, he must apply to the Court for an order delaying the distribution under section 27 of the Absconding Debtors' Act.

This construction, in my opinion, enables the provisions of both acts to be justly carried out, and at the same time to allow an expeditious realization of the debtor's estate.

The effect of this view would exclude Van-Nostrand's claim to be ranked had the sheriff made his entry on the 18th or 19th of June. Does the sheriff's delay in making his entry until the 28th July affect the rights of the prior creditors? I do not think so. (See *Maxwell* v. *Scarfe*, 18 Ont., 529.) I therefore disallow Van-Nostrand's claim to be ranked upon the monies in the sheriff's hands.

The distribution scheme of the sheriff will therefore have to be remodelled, and John Abell included as an execution creditor to share in the $1,734, less the deductions I have spoken of, $400 and costs. If necessary the interpleader plaintiffs may file an affidavit to show the amount of these costs (if any).

As this point is a new one and properly stated by this motion for the opinion of the Court, I make no order as to costs.

COURT OF APPEAL.

From 1st Div. Ct., York.]
OSLER, J.A.] [Oct. 18.

WOOD *v.* JOSELIN.

Assignments and preferences—Garnishment of debt—Subsequent assignment of primary debtor—Priorities—R.S.O. (1887), c. 124, s. 9.

This is an appeal by the plaintiff from the judgment of the Junior Judge of the First Division Court, York, discharging the garnishee from the action *(post.* p. 563).

OSLER, J.A.—This action was brought by the plaintiff, as primary creditor, against Joselin, as primary debtor, and Sheppard, garnishee, under the appropriate clauses of the Division Courts Act, the primary creditor's claim not being a judgment. The summons was duly served upon the parties on the 30th and 31st January, 1890, and judgment was obtained against the primary debtor on the 14th February. The case was

adjourned as against the garnishee pending the trial of an action against him, by the primary debtor, in the High Court for the debt, part of which was attached in the present suit. Judgment was recovered therein against the garnishee in April, and on the 5th May the primary debtor made an assignment, under the Assignment and Preference Act to one Sumerfeldt, who thereupon gave notice to the plaintiff in this suit that he claimed the debt so attached by him. Thereupon the case came on at an adjourned hearing against the garnishee, and the judgment appealed from was given, discharging him from the suit on the ground that the assignment took precedence of the attachment, and the plaintiff was ordered to pay the garnishee's costs. The question is, whether an assignment under the Act does intercept or take precedence of such an attachment. It is clear that the service of the garnishee summons does not credit as between garnisher and garnishee any debt either at law or in equity, and does not operate to any extent as an assignment or transfer of the debt to the garnisher. *Chatterton* v. *Walmey*, 17 Chy.D., 259, C.A., *In re Combined Weighing and Advertising Machines Co.*, 43 Chy.D., 99. Nevertheless, unless sec. 9 of the Assignment and Preference Act applies, the effect of service of the order or summons (it will be understood that I am speaking of the summons under sections of the Division Courts Act), is to prevent the debtor from dealing with the debt to the prejudice of the garnisher, who has obtained a statutory right which he is entitled to follow out to its legitimate results. If, therefore, it is to be intercepted by the subsequent assignment, and the garnisher deprived of the right thus acquired, it must be because his case comes plainly within the provisions of the 9th section. But for that section it is manifest that the assignee could only take what the debtor could give him, and that he would take subject to any rights which creditors had acquired against the property. It may be conceded that an attaching order or summons is a species of execution—an execution against a debt. That is so held and it is so described *In re Stanhope Silk Collieries Co.*, 11 Chy.D., with reference to its effect. But in common parlance we do not speak of it as an execution, but as an attachment, and we see in the English Bankrupt Acts, containing provisions cognate to the 9th section of this Act, that the distinction is maintained, and the case of execution and attachment expressly provided for. *Ex parte Pillars*, 17 Chy. D.,653, *Butler* v. *Wearing*, 17 Q.B.D., 182. Giving all due weight to the fact, no doubt apparent on the face of the quasi insolvent legislation found in the Assignment Act and the Creditors' Relief Act, that the object of the legislature is to prevent one creditor from obtaining by preference or otherwise advantage over others, we must, nevertheless, see that the language of the 9th section fairly treated embraces this case. I think that the reference to the execution in the sheriff's hands and the special provisions as to the costs of the execution creditor, show that the executions therein referred to are executions ordinarily known as such—executions placed in the sheriff's hands, under which the assignor's goods or lands may be seized and sold. It appears to me that the case of an attachment of a debt was not present to the mind of the legislature ; that it has not been provided for, and, therefore, that the right of the attaching creditor has not been taken away. Grotesque and unjust as are provisions of the Act in some respects as regards the execution creditor, they would, if he were within them, be doubly so as regards an attaching creditor. The execution creditor by *fi. fa.* has a judgment for his debt, the costs of which he is entitled to recover from his debtor if he can. They are, and remain, a debt, and he can prove for them as such against the estate or the lands of the assignee, if he was not entitled to enforce payment in full under his execution. On the other hand, if the garnisher is cut out by the assignment and the attaching order or summons discharged, the costs which he has lawfully incurred are lost to him, and he may even, as in the case before me, be ordered to pay the costs of a proceeding, against which, until the execution of the assignment, the garnishee had no defence whatever. Nay, if the attaching order is an execution within the meaning of the section a final order to pay over may have been made or judgment recovered against the garnishee in a contested issue as to the debt and execution against him placed in the sheriff's hands, and yet as against the original debtor, the execution by way of attachment not having been completed by assignment of the debt, it would probably follow that all these proceedings would go for nothing. The creditor must lose his costs, and the assignee, since he cannot take the benefit of them, must bring his own action for

the debt, the liability for which has already been tried between the garnisher and the garnishee. Upon the whole, and after a good deal of consideration, due to the careful judgment of the learned Judge of the Division Court, I have come to the conclusion that the appeal must be allowed. It was contended by Mr. Shepley that section 9 in question was *ultra vires* the legislature. I am glad to find a way of disposing of the case without entering upon that question. I do not notice anything in the Creditors' Relief Act, which affects the general question argued and decided. But that Act does not apply to a Division Court execution or executions where there is no execution from the High Court in the sheriff's hands against the debtor. The garnisher must have judgment in the court below for his debt with costs, and also the usual costs of this appeal.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

From 1st Div. Ct., York.]

OSLER, J.A.] [Oct. 18.

WOOD *v.* JOSELIN.

Assignments and preferences—Garnishment of debt—Subsequent assignment of primary debtor—Priorities—R.S.O. (1887), c. 124, s. 9.

An assignment for the benefit of creditors by a primary debtor, after a garnishing summons has been duly served upon him and the garnishee, and judgment has been obtained thereon, does not intercept or take precedence of the judgment, and the primary creditor may enforce payment by the garnishee.

Judgment of the First Divison Court of York reversed.

G. F. Shepley, Q.C., for the appellant.

J. F. Woodworth for the respondent.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

STREET, J.] [Sept. 6.

MARTHINSON *v.* PATTERSON.

Chattel mortgage—Defect—Taking possession—Rights as against subsequent mortgagee—Full amount of mortgage money not advanced, effect of—Foreign contract as to chattels in Ontario.

A defect in a chattel mortgage is not cured, as against a subsequent mortgagee, by taking possession of the chattels, where the subsequent mortgage was made before such possession, although at the time of the seizure there was no default under the subsequent mortgage and the mortgagor was by the terms of it entitled to retain possession until default.

Where the full amount mentioned in a chattel mortgage is not actually advanced at the date at which it is given, it should nevertheless, in the absence of fraudulent intent or bad faith, stand as against a subsequent mortgagee as a security for the amount actually advanced at the time when the subsequent mortgagee's rights accrued. The rights of parties resident in a foreign country, and there making a contract in regard to goods in Ontario, are governed by the law of Ontario.

River Stave Co. v. *Sill*, 12 O.R., 557, followed.

Shepley, Q.C., for the plaintiff.

Masson, Q.C., for the defendant.

BOYD, C.] [Oct. 18.

KENT *v.* KENT.

Husband and wife—Conveyance of land to wife directly—Devise of land by wife—Tenancy by the courtesy—Adverse possession—Statute of Limitations—Infants—R.S.O., c. III, s. 43—Devise of land conveyed to married woman by strangers.

A conveyance of lands from a husband to his wife directly was made in 1870, was expressed to be in consideration of "respect and of one dollar," was in the usual statutory short form, and was duly registered. The marriage was in 1854.

Held, that the lands passed by the conveyance to the wife as her separate property.

The wife died in 1872, having made a will leaving her real estate to her two daughters, then aged respectively seventeen and twelve. The father remained in sole possession from the mother's death till his own death in 1890. This action was begun in 1890 by the younger daughter and the son of the elder to recover possession from the devisee of the husband.

Held, that the husband had no title by the courtesy, because he was excluded by the devise to the daughters of the lands conveyed by him

to his wife; he was therefore not rightfully in possession as against the daughters; and, as the younger daughter had by R.S.O., c. 111, s. 43, only five years after coming of age to begin proceedings, the action was barred as to these lands.

Other lands were conveyed to the wife by strangers in 1867 and 1869, of which the husband also remained in possession after her death.

Held, that the devise of these lands by her did not affect the right of her husband as tenant by the courtesy, and his possession was in that character; and, therefore, as to these lands, the action was not barred.

Gibbons, Q.C., and *George McNab*, for plaintiffs.

W. R. Meredith, Q.C., and *E. R. Cameron*, for the defendant.

Chancery Division.

Full Court.] [Sept. 4.

STILLIWAY *v.* CITY OF TORONTO.

Municipal law—Action for negligence—Claim under R.S.O., 1887, c. 184, s. 531—Judgment against third party.

The plaintiff brought this action against the City of Toronto for damages for injuries sustained through a defective sidewalk. Before pleading the defendants applied under R.S.O., 1887, c. 184, s. 531, and obtained an order making O. a party defendant, and in their defence alleged that O. was responsible for the defect in the sidewalk.

O. also delivered a full defence to the action and took part by counsel at the trial.

A verdict was rendered for $400 damages, and the jury found that O. was responsible for the cause of the accident.

After verdict the plaintiff applied for leave to amend the statement of claim by claiming directly against O., which leave was granted, and judgment entered against O. for the damages with full costs of suit, and dismissing the action with costs as against the city.

Held, that the amendment was rightfully allowed, and the judgment should not be disturbed.

Miller, Q.C., for the plaintiffs.

Biggar, Q.C., for the City of Toronto.

J. K. Kerr, Q.C., for the defendant, O.

Full Court.] [Sept. 9.

THOROLD *v.* NEELON.

Company—Liability to contribute—Fully paid-up shares—Notice—Allowance of discount.

A railway company agreed to transfer to N., a director, a certain number of fully paid-up shares as security for payment of a loan of $100,000, then made by N. to the company, and afterwards did transfer what purported to be fully paid-up shares to the number stipulated to him. An execution creditor, with writs of *fi. fa.* returned *nulla bona*, had brought this action against N., alleging the shares not to be fully paid-up, but that a sufficient sum remained due thereon to cover his judgment, and asking for an order against N. for payment accordingly. It appeared that seventy-five of the shares had formerly been part of a lot of 168 shares, held by D.B., who had paid in all $3,750 to the company, which represented the par value of seventy-five shares. The directors resolved to treat the $3,750 accordingly as payment in full of seventy-five of the 168 shares, and then got D.B. to transfer these seventy-five shares to N., in part compliance with their agreement with him. As to the balance of the shares transferred to N., it appeared that a discount had been allowed upon them, but N. had no knowledge of this fact.

Held, that the shares must be considered as fully paid up in the hands of N.

Collier for the plaintiffs.

W. Cassels, Q.C., for the defendant.

ROBERTSON, J.] [Sept. 12.

RE COLLINGWOOD DRY DOCK COMPANY—WEDDELL'S CASE.

Company — Winding-up proceedings — Statements as to shares in petition of incorporation —Liability to contribute.

In winding-up proceedings of the above company, it appeared that W. had in the petition for incorporation, declared that he had taken 250 shares of the capital stock of the company.

Held, that bearing in mind the provisions of the Ontario Joint Stock Companies Letters Patent Act, R.S.O., 1887, c. 157, s. 7, s-ss. 2, 3, 4; ss. 13, 30, 43, W. was liable to be held as a contributory to the amount of these shares.

The general scope of the Act shows that it was the intention of the legislature to compel persons who lend their names to establish a

company to be really substantially liable, and not to allow them to hold out their names as the promoters, and at the same time to incur no obligation.

W. H. P. Clement for W.

J. M. Clark for the liquidator.

FERGUSON, J.] [Sept. 4.

SECORD *v.* TRIMMER.

Act to Simplify the Procedure for Enforcing Mechanics' Liens—Scope of Act—Procedure.

Held, that notwithstanding the apparently unlimited provisions of section 1 of the Act of last session, entitled an Act to Simplify the Procedure for Enforcing Mechanics' Liens, a perusal of the whole Act leads fairly to the conclusion that the intention of the legislature in passing it was to simplify procedure in the High Court only for enforcing mechanics' liens, leaving the summary and simple procedure for that purpose before fully provided for in County Courts and Division Courts unaffected by the passing of the Act.

Cox for appellant.

Aylesworth, Q.C., contra.

BOYD, C.] [Oct. 10.

RE TOWNSHIPS OF HARWICH AND RALEIGH.

Water and watercourses—Arbitration and award—Municipal corporations—Arbitration under s. 590 of R.S.O., c. 184—Constitution of board of arbitrators—"Interested," in s. 389, meaning of.

A question arose under s. 590 of the Municipal Act, R.S.O., c. 184, between the townships of H. and R., whether H. caused waters to flow on R., to the detriment of R., which ought to be drained from R. at the expense of H. The township of T. also discharged waters over the other side of R., opposite H.

Held, that T. was not "interested" within the meaning of s. 389 of the Act; and therefore that a board of three arbitrators appointed, pursuant to that section, one by each of the three municipalities, was not properly constituted to determine the question; and their award was set aside.

M. Wilson, Q.C., for Harwich.

W. R. Meredith, Q.C., and *Wm. Douglas*, Q.C., for Raleigh.

BOYD, C.] [Sept 30.

ELLIOTT *v.* ELLIOTT.

Landlord and tenant—Covenant to expend manure upon the premises—Manure made after expiry of term—Mesne profits—Claim in former action—Estoppel.

A married woman, lessee, covenanted to use upon the demised premises all the straw and dung which should be made thereupon,

Held, that the lessor was entitled to recover for manure removed from the premises which was there at the expiry of the term, but not for manure made thereafter, while the lessee was overholding.

Hendall v. *Pollock*, 6 M. & W., 529, followed.

In a former action of ejectment brought by the plaintiff against the defendants, mesne profits were claimed, but no evidence was given in regard to them,

Held, that the plaintiff was not estopped from recovering in this action occupation rent for the premises since the expiry of the term.

J. B. Clarke, Q.C., and *J. B. Jackson*, for the plaintiff.

Middleton for defendants.

BOYD, C.] [Sept. 30.

WOOD *v.* STRINGER.

Mechanics' lien—Ascertainment of amount due to contractor—Parties—Registered owner not liable on contract—Work and labor—Acceptance of bad work—Congregation occupying church—Reduction of price for bad work—Measure of—Extras—Written order for.

In an action to enforce a mechanics' lien brought by material men against the contractor and the registered owner, the contest was as to whether anything was due to the contractor, and the registered owner was not liable on the contract.

Held, that the amount due to the contractor could not be ascertained without the persons liable on the contract being brought before the Court. The work in question was the building of a church. The last of the work done was the pews, and as they were being put in, objection was made by the architect to their material and workmanship.

Held, that the occupying of the church with the pews objected to in it was not an acceptance of the work.

Held, also, that a reduction of the contract price by an amount equal to the difference in value between the bad stuff and that which should have been used was not an adequate measure of the set-off to which the proprietors were entitled.

The contract provided that no extras were to be allowed unless expressly ordered and payments for the same expressly agreed for in writing by the proprietors or architects.

Held, that extras could not be allowed unless a writing was proved.

F. E. Hodgins for plaintiffs.

James Reeve, Q.C., for defendant, Colville.

BOYD, C.] [Nov. 7.

BICKERTON *v.* DAKIN.

Mechanics' lien—Partnership—Claim of lien registered in name of, after dissolution—R.S.O., c. 126, ss. 16, 19—"Claimant"—"Person entitled to the lien"—53 Vict., c. 37—Jurisdiction of High Court—Joining liens—Statement of claim under 53 Vict., c. 37, s. 2—Amendment.

A claim of lien under the Mechanics' Lien Act was registered, and proceedings to enforce it were taken in the name of a firm which had been dissolved, and one of the members of which had died prior to the registration. The materials for which the lien was claimed were, however, all furnished by the firm before the dissolution or death, and it was provided that the dissolution was not to affect this and other engagements.

S. 16 of R.S.O., c. 126, under which the lien was registered, speaks of the "claimant" of the lien, and s. 19 of the "person entitled to the lien." The Interpretation Act, R.S.O., c. 1, s. 8 (13), shews what the word "person" shall include, and does not mention a "firm" or "partnership."

Held, that the lien attached on the land and was validly continued; the difficulty as to the word "person" was overcome by the use of the alternative word "claimant," which extended to a partnership using the firm name in the registration of the lien.

Under the Act to Simplify the Procedure for Enforcing Mechanics' Liens, 53 Vict., c. 37, it is competent to join liens so as to give jurisdiction to the High Court, though each apart may be within the competence of an inferior court.

The plaintiffs in proceeding under 53 Vict., c. 37, to enforce their lien filed with a Master as the "statement of claim" mentioned in s. 2, a copy of the claim of lien and affidavit registered, verified by an affidavit, and the Master thereupon issued his certificate.

Held, that if the "statement of claim" filed was not in proper form, inasmuch as it contained all the facts required for compliance with the Act, an amendment *nunc pro tunc* should be allowed.

Masten for the plaintiffs.

Aylesworth, Q.C., for the defendant Nesbitt.

Practice.

BOYD, C.] —— [Nov. 4.

IN RE ANCIENT ORDER OF FORESTERS AND CASTNER.

Security for costs—Interpleader.

Security for costs may be ordered in interpleader proceedings.

Swain v. *Stoddart*, 12 P.R., 490, approved and followed.

Belmont v. *Aynard*, 4 C.P.D., 221, 352, distinguished.

The party substantially and in fact moving the proceedings, whether plaintiff or defendant in the interpleader issue, should, if resident out of the jurisdiction, give security to the opposite party.

A. G. Chisholm for the claimant Castner.

Hellmuth for the claimant Keishner.

BOYD, C.] [Oct. 22.

PATERSON *v.* DUNN.

Pleading—Slander—Particulars.

In an action of slander, the statement of claim, after various specific allegations, charged that at divers times during the years 1888, 1889, and 1890, and to many people in and about the city of T., the defendant falsely and maliciously repeated the said slanders and words of like effect, and spoke of the plaintiff words conveying the meaning the said slanders and the said words conveyed,

Held, that this was embarrassing and should be stricken out unless the plaintiff elected to amend upon payment of costs.

F. W. Garvin for plaintiff.

Middleton for defendant.

BOYD, C.] [Oct. 28.

CRABBE *v.* HICKSON.

Discovery—Particulars—Action for wrongful dismissal—Defence of misconduct.

In an action for wrongful dismissal, where the defence is misconduct generally, it is proper to direct particulars showing the nature and character of the instances relied on by the employer; these particulars should set forth the dates, substantial particulars, and circumstances of all the instances and occasions wherein and whereon the plaintiff misconducted himself, on which the defendant means to rely; and leave should be given to supplement with further particulars if discovered before trial.

E. D. Armour, Q.C., for the plaintiff.

W. R. Smyth for the defendants.

BOYD, C.] [Oct. 22.

IN RE SOLICITORS.

Solicitor and client—Taxation of bill of costs by assignee for creditors of client—Cost of taxation—Assignee personally entitled—Set-off.

The parties who initiate and intervene upon the taxation of a solicitor's bill of costs become personally liable to pay the costs of taxation.

And where solicitors rendered to the assignee of an insolvent their bill for services to the insolvent, and the assignee taxed the bill and had it reduced by more than one-sixth,

Held, that he had a right personally to recover from the solicitors the costs of the taxation, and that there should be no set-off against the amount coming to the solicitors from the estate of the insolvent as a dividend upon their bill.

Where authorities acted upon were not cited, no costs were given.

Delamere, Q.C., for the solicitors.

Aylesworth, Q.C., for the assignee.

BOYD, C.] [Oct. 28.

HALL *v.* HOGG.

Costs—Mechanics' lien action—Parties—Attacking status of lien-holders—Costs of owner—Costs of lien-holders—Scale of costs.

In an action by lien-holders to enforce their lien under the Mechanics' Lien Act it is not necessary to make other holders of registered liens parties in the first instance in order to attack their status as lien-holders; but this can be done where they are added as defendants in the Master's office.

The amount due from the owner to the contractor should be paid into court by the latter less his costs, which should be taxed as to a stakeholder watching the case.

The costs of lien-holders establishing their liens should be paid as a first charge on the fund.

The costs of lien-holders subsequent to judgment of reference should be taxed upon the scale appropriate to the amount found due to each.

J. A. Macdonald for the plaintiffs.

A. Hoskin, Q.C., for the defendant Fewtrell.

C. W. Kerr, for the defendant Howland.

C. Henderson, for the defendant Radcliff.

BOYD, C.] [Oct. 22.

CLARKE *v.* CREIGHTON.

Costs—Execution for—Rule 863—"Immediately"—Set-off—Rule 1205—"Interlocutory"—Costs after judgment—Solicitor's lien—Divisions of Court—Entitling papers—Amendment.

The word "immediately" in Rule 863 means "instanter"; and a party to whom costs are awarded by an order may issue execution therefor on the day of the taxation.

Proceedings may be considered "interlocutory" within the meaning of Rule 1205 till satisfaction is obtained in respect of the moneys, costs, or subject-matter in controversy; and where judgment was given for payment by the plaintiff to the insolvent defendant of the costs of the action, and the defendant's solicitors were by an order declared to have a lien upon such judgment, and the plaintiff became entitled against the defendant to costs of garnishing proceedings, upon the judgment, begun before the solicitors lien was declared, a set-off was allowed.

This action was in the Queen's Bench Division; but the plaintiff, in applying in respect to the costs of writs of *fi. fa.* and a set-off of costs, entitled his proceedings in the Chancery Division and "in the matter of certain orders made in the action."

Held, that this was formally wrong; but an amendment was allowed on payment of costs.

S. R. Clarke, the plaintiff in person.

A. H. Marsh, Q.C., for the defendant.

MANITOBA.

COURT OF QUEEN'S BENCH.

Full Court.] [October 14.

WATEROUS v. JONES.

Statute of Frauds—Written guarantee.

The plaintiffs sued the defendant upon a written guarantee in these words :

High Bluff, Sept. 1st, 1887.

I, James P. Jones, Thresher, hereby agree to become responsible for the debt contracted by James Jones to the Waterous Engine Works Co'y, Ltd., of Winnipeg, the said debt being past due notes and accounts and interest due on the Champion Engine and Separator purchased by him the said James Jones and C. Neelands under the terms and conditions of their the said Waterous Engine Works contract and agreement, all of which terms and conditions I hereby agree to abide by.

JAMES P. JONES [Seal].

Witness—Geo. Erb.

Held, per KILLAM, J., that the plaintiffs could not sue upon the alleged agreement as a covenant, not being named therein as covenantees—there not being sufficient mention of the plaintiffs, or of the time where the agreement was to be performed and hence within the Statute of Frauds.

Verdict for defendants.

A. E. McPhillips, for plaintiffs.

Culver, Q.C., and *Cooper*, for defendants.

The plaintiff appealed.

Held, That from the wording of the instrument the meaning must be that the defendant became responsible to some one not named for James Jones' debt, but if the plaintiffs are named in the instrument, and without doing much violence to the rules of construction, it may be read to mean that the defendants became responsible to them, (*Williams* v. *Lake*, 29 L.J., Q.B. 1, distinguished.)

Held, That evidence of the surrounding circumstances will be looked at in the case of guarantees to enable the court to ascertain the meaning of an ambiguously-worded instrument. *Newell* v. *Radford*, L.R. 3 C.P. 52 ; *Hefjreed* v. *Meadow*, L.R. 4 C.P. 595 ; *Vandeburg* v. *Spooner*, L.R. 1 Ex. 316.

Appeal allowed with costs.

Ewart, Q.C., and *McPhillips*, for appellants.

Culver, Q.C., and *Cooper*, for defendants.

Appointments to Office.

REGISTRARS OF DEEDS.

District of Parry Sound.

Thomas Kennedy, of the Town of Parry Sound, in the District of Parry Sound, Esquire, to be Registrar of Deeds in and for the said District of Parry Sound, in the room and stead of Arthur Starkey, Esquire, resigned.

District of Algoma.

Robert Adam Lyon, of the Village of Michael's Bay, in the District of Manitoulin, Esquire, to be Registrar of Deeds in and for the District of Algoma, in the room and stead of Charles James Bampton, Esquire, deceased.

LOCAL MASTER.

County of Perth.

John Elley Harding, of the City of Stratford, in the County of Perth, Esquire, one of Her Majesty's Counsel learned in the Law for the Province of Ontario, to be Local Master for the said County of Perth, in the room and stead of His Honor Judge Lizars, resigned.

DISTRICT ATTORNEY AND CLERK OF THE PEACE.

District of Muskoka and Parry Sound.

Thomas Johnson, of the Town of Gravenhurst, in the District of Muskoka, Esquire, Barrister-at-Law, to be District Attorney and Clerk of the Peace in and for the United Provisional Judicial District of Muskoka and Parry Sound, in the room and stead of Alexander Aird Adair, Esquire, resigned.

COMMISSIONERS FOR TAKING AFFIDAVITS FOR USE IN ONTARIO.

City of Montreal.

Ronzo Heathcote Clerk, of the City of Montreal, in the District of Montreal and Province of Quebec, Esquire, to be a Commissioner for taking affidavits within and for the said City of Montreal, and not elsewhere, for use in the Courts of Ontario.

County of London, (England.)

George Kirk, of No. 1a Paternoster Row, in the City of London, and County of London, in that part of the United Kingdom of Great Britain and Ireland called England, Gentleman, Solicitor, to be a Commissioner for taking affidavits within and for the said County of London, and not elsewhere, for use in the Courts of Ontario.

ASSOCIATE-CORONERS.

County of Frontenac.

David Edward Mundell, of the City of Kingston, in the County of Frontenac, Esquire, M.D., to be an Associate-Coroner within and for the said County of Frontenac, in the room and stead of Chamberlain Arthur Irwin, Esquire, M.D., deceased.

Daniel Phelan, of the City of Kingston, in the County of Frontenac, Esquire, M.D., to be an Associate-Coroner within and for the said County of Frontenac.

POLICE MAGISTRATES.

Town of Gananoque.

Philip Heaslip, of the Town of Gananoque, in the County of Leeds, Esquire, to be Police Magistrate in and for the said Town of Gananoque.

Town of Port Arthur.

William Currie Dobie, of the Town of Port Arthur, in the District of Thunder Bay, Esquire, to be Police Magistrate in and for the said Town of Port Arthur, in the room and stead of Alexander William Thompson, Esquire, resigned.

DIVISION COURT CLERKS.

County of Lennox and Addington.

Frederick William Armstrong, of the Village of Bath, in the County of Lennox and Addington, Gentleman, to be Clerk of the Second Division Court of the said County of Lennox and Addington, in the room and stead of Charles L. Rogers, deceased.

Counties of Prescott and Russell.

Joseph Belanger, of the Village of Plantagenet, in the County of Prescott, Gentleman, to be Clerk of the Fourth Division Court of the United Counties of Prescott and Russell, in the room and stead of T. A. VanBridger, resigned.

District of Thunder Bay.

Neil McDougall, of the Town of Port Arthur, in the District of Thunder Bay, Gentleman, to be Clerk of the First Division Court of the said District of Thunder Bay, in the room and stead of John Munro, resigned.

County of Prince Edward.

John Wesley Clarke, of the Village of Wellington, in the County of Prince Edward, Gentleman, to be Clerk of the Fifth Division Court of the said County of Prince Edward, in the room and stead of J. B. Garratt, resigned.

BAILIFFS.

District of Rainy River.

William Neil, of the Township of Alberton, in the District of Rainy River, to be Bailiff of the Second Division Court of the said District of Rainy River, in the room and stead of Wm. Lindsay, resigned.

District of Parry Sound.

Walter Sharpe, of the Township of Armour, in the District of Parry Sound, to be Bailiff of the Fourth Division Court of the said District of Parry Sound, in the room and stead of James Sharpe, resigned.

County of Prince Edward.

Charles Herrington, of the Village of Wellington, in the County of Prince Edward, to be Bailiff of the Fifth Division Court of the said County of Prince Edward, in the room and stead of Thomas Jackson, resigned.

Flotsam and Jetsam.

WHEN a lady, giving evidence in a Kansas court, refused to answer a question, on the plea that it was not fit to tell decent people, her questioner blandly said: "Well, then, step up and whisper it to the judge."—*Ex.*

MR. JUSTICE NORRIS, in the Calcutta High Court, recently delivered what is understood to be the shortest summing-up on record. It was as follows: "Gentlemen of the jury, the prisoner has nothing to say, and I have nothing to say. What have you to say?"—*Ex.*

"I WISH to ask this court," said a lawyer who had been called to the witness box to testify as an expert, "if I am compelled to come into this case, in which I have no personal interest, and give a legal opinion for nothing?" "Yes, yes, certainly," replied the mild-mannered judge, "give it for what it is worth."—*Ex.*

IN a case in which a man was being tried for murder, when the clerk repeated the formula, "Prisoner, look upon the jurors; jurors, look upon the prisoner," one of the "sworn twelve,"

who was a very stupid man, looked solemnly at the prisoner for a while, and then said, "I think he's guilty; he looks like a murderer."—*Ex.*

THE smallest suit on record was recently tried in Scotland for the stupendous sum of half a penny. The plaintiff was carried in the defendants' cars beyond his destination, and compelled to pay the halfpenny as fare to the station. He recovered judgment, and compelled the company to refund the money, with costs.—*Ex.*

COMMON as the expression to "dun" a debtor is, but few persons are, perhaps, aware of the origin of the word. It owes its birth to one Joe Dun, a famous bailiff in the town of Lincoln, England, so extremely active and so dexterous in his business that it became a proverb, when a man refused to pay, "Why do you not Dun him?"—that is, why do you not set Dun to arrest him? Hence it became a cant word, and is now as old as the days of Henry VII.—*The Green Bag.*

DANIEL O'CONNELL was at one time defending a man accused of murder at Clonmell. The circumstantial evidence was so strong against the prisoner that the jury had already determined upon their verdict of guilty, when the man supposed to be murdered was brought into court alive and unhurt. The jury were desired to return their verdict at once, and they did so, which was one of "Guilty." "What does this mean?" asked the Court. "If the man has not been murdered, how can the prisoner be guilty?" "Plaze yer honor," said the foreman, "he's guilty; he stole my bay mare three years ago."—*Ex.*

A BARRISTER who had been "questioning" a witness for some time, at last got him down to personalities. "Did I understand you to say, sir, that the defendant made certain remarks about me?" "I said so, sir." "Ah! I thought so; well now, sir, I should like to ask if you could substantiate those remarks?" "No, sir; I don't think I could." "Ah! something libellous, I presume. Will you be kind enough to state to the court what he did say?" "Yes, sir; he said you were an honest and truthful man, and—" "That's enough; call the next witness." And the barrister went into the robing-room for a minute's relaxation without excitement.—*Pump Court.*

A BARRISTER, on one occasion, was given the following lawyer's letter to put into Latin verse, by one who was skeptical as to his reputed powers of treating successfully the most unpromising subjects:—

"Rev. Sir,—Your attendance is requested at a meeting of the Bridge Committee, to be held at 12 noon, on Saturday the 5th November, to consider Mr. Diffle's proposal as to the laying down of gas-pipes.

"We are, Rev. Sir,

"Your obedient servants,

"—— and ——"

"Solicitors."

Thereupon it was promptly rendered thus:—

Concilio bonus intersis de Ponte rogamus
Saturni sacro, vir reverende, die.
Nonæ, ne frustrere, dies erit ille Novembres,
Sextaque delectos convocat hora viros.
Carbonum luci suadet struxisse canales.
Diphilus; ambigitur prosit an obsit opus.
Hanc, tibi devincti, Fabri, natusque paterque,
Actores, socii, vir reverende, dabant.

—*Pump Court.*

FACETIÆ.—The first Viscount Guillamore, when Chief-Baron O'Grady, was remarkable for his dry humor and biting wit. The latter was so fine that its sarcasm was often unperceived by the object against whom the shaft was directed.

A legal friend, extremely studious, but in conversation notoriously dull, was once showing off to him his newly built house. The book-worm prided himself especially on a sanctum he had contrived for his own use, so secluded from the rest of the building that he could pore over his books in private, quite secure from disturbance.

"Capital!" exclaimed the Chief-Baron. "You surely could, my dear fellow, read and study here from morning till night, and no human being be *one bit the wiser.*"

In those days before competitive examinations were known, men with more interest than brains got good appointments, for the duties of which

they were wholly incompetent. Of such was the Hon. —— ——. He was telling the Chief-Baron of the summary way in which he disposed of matters in his court.

"I say to the fellows that are bothering me with foolish arguments, that there's no use in wasting my time and their breath; for that all their talk only just goes in at one ear and out at the other."

"No great wonder in that," said O'Grady, "seeing that there's so little between to stop it." —*The Green Bag.*

THE appended copy of an original document, issued by a certain J.P. to the north of us, induces the belief that some Justices of the Peace have more education than others, and that the others have no more than the "law allows"; for example :—

SUMONS TO DEFENDANT.

CANADA
PROVANC OF ONTARIO
DISTRICT OF PARREY SOUND
} to John vaughn of the township of Mcmurrich in the district of Parrey sound Farmer

whereas infermation has this day been laid or compliant has this day been maid before the undersigned a Justice of the Peace in and for the said district Parrey sound for that you did on the fifth day of agust Instant with mallace and aforethote Kill a goose the property of Lucinda Margrit gill thease are therefore to comand you in her magestys Name to be and apeare on monday the Elevanth day of agust Instant at the houre of two oclock in the afternoon at the Residance of John Brown of Bourdeau before me or such Justice or Justices of the Peace for the said district as shall then be there to answer to the said infermation or Compleant and to be further dealt wtth acording to law

given under my hand and seal this 5th day of agust in the year of our Lord 1890 at Bourdeau In the district aforesaid —— —— J.P.

Law Society of Upper Canada.

THE LAW SCHOOL, 1890.

LEGAL EDUCATION COMMITTEE.

CHARLES MOSS, Q.C., *Chairman.*

C. ROBINSON, Q.C.	Z. A. LASH, Q.C.
JOHN HOSKIN, Q.C.	J. H. MORRIS, Q.C.
F. MACKELCAN, Q.C.	J. H. FERGUSON, Q.C.
W. R. MEREDITH, Q.C.	N. KINGSMILL, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers: E. D. ARMOUR, Q.C.; A. H. MARSH, B.A. LL.B. Q.C.; R. E. KINGSFORD, M.A. LL.B.; P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

VOL. XXVI. DECEMBER 1, 1890. NO. 19.

WE are informed that Sir John Thompson is at work on a bill for the codification of the criminal law of Canada. This will, we presume, involve a repeal of the Acts we now have relating to that subject. This action may possibly be desirable, but we trust the authorities at Ottawa do not intend to follow our Provincial legislators in the annual game of tinkering and amending the statutes.

ANY decision in reference to matters connected with the development of the practical use of that mysterious fluid known as electricity is interesting. We notice that in the case of *Cumberland Telephone Company* v. *United Electric Railway Company*, 42 Fed. Rep., 273, it has been held that, in view of the present state of electrical science, a telephone company cannot enjoin the operation of an electric railway on account of the serious injury to their business caused by the escape of electricity from its rails. In other words, let every opportunity be given to those who are endeavoring to apply this great force of nature to the practical use of mankind, even though others may suffer temporary inconvenience. The principle is a sound one, and commends itself to the nineteenth century thinking-machine.

A POINT of practice of some importance to mortgagees was recently decided by Ferguson, J., in the case of *Smith* v. *Brown*, *post infra* p. 603. Default had been made in payment of a mortgage, and the mortgagee had given notice of sale under the power of sale which was in the short form, and as follows: "Provided that the said mortgagee on default of payment for one month may, on one month's notice, enter on and lease and sell the said lands." During the time provided for payment by the notice of sale, the mortgagee proceeded to advertise the mortgaged lands for sale on a day subsequent to that limited for payment. The mortgagor then brought an action to restrain the further publication of the advertisement until the time for payment had expired, as being in contravention of R.S.O., c. 102, s. 30, and Ferguson, J., being of opinion that the publication of an advertisement was the taking of a proceeding within the meaning of the Act, granted the injunction as prayed, and the parties agreeing that the motion should be turned into a motion for judgment, he gave the plaintiff the costs of the action.

The Indian Jurist, coming to us from the antipodes, is a well conducted and interesting journal. We notice in the last number received reference made to various matters of especial interest in that great country, and some of them of interest to ourselves. The editor takes exception to a suggestion made by a contemporary, that old criminal offenders should be punished by whipping, in addition to rigorous imprisonment. There is a good deal of morbid sentimentality on the matter of whipping. We are satisfied that the lash is often the only means of reaching the conscience of certain offenders, and we should prefer to see it more used than it is. In the hot climate of India, boys as well as girls come to maturity at a very early age, and there are several allusions to that fact in the publication before us. The custom of child marriage comes in for much discussion in the number before us, and the writer urges the propriety of some protection being afforded to these unfortunate children in the same direction as the special legislation in existence in England and this country for unmarried girls. A precocious youth at Serampore recently stabbed a school-master in the abdomen with a knife, the pedagogue barely escaping with his life. The jury were compelled to find the boy guilty, but perhaps having the remembrance of some old scores of their own to wipe out, recommended the young rascal to mercy on account of his extreme youth; and the Sessions Judge, laying the blame on the parents for not paying better attention to his morals, punished them by imposing a fine of one hundred rupees. We agree with the *Jurist* in the hope that the High Court would not fail to revise the sentence, and agree with the suggestion that probably a good flogging might tend to teach this juvenile to restrain his homicidal instincts. At the same court, curiously enough, a girl of eight years was found guilty by the Judge of murdering a child of four, by drowning it in a canal, in order to get possession of its jewels. As the jury would not convict, the Judge referred the case to the High Court. How this tribunal will treat the case remains to be seen. We presume they will not follow the example of the Judge who fined the boy's parents—certainly a novel way of dealing out criminal law under these circumstances, though under others perhaps worthy of serious consideration.

RIGHTS OF MORTGAGEES AS AGAINST MECHANICS' LIENS.

By section 5, (3), of The Mechanics' Lien Act (R.S.O., c. 126), it is provided that "in case the land upon or in respect of which any work as aforesaid is executed, or labor performed, or upon which materials or machinery are placed, is incumbered by a prior mortgage or other charge, and the selling value of the land is increased by the construction, alteration, or repairs of the building, or by the erection or placing of the materials or machinery, the lien under this Act shall be entitled to rank upon the increased value in priority to the mortgage or other charge." Mr. Holmested, in his edition of the Act, has pointed out that the language of this section varies from the similar section in the Revised Statutes of 1877 (R.S.O., 1877, c. 120, s. 7). In that section the words used were "a mortgage or other charge existing or created before the

commencement of the work." The revisers of the Statutes no doubt thought that the expression "prior mortgage" was a more compendious expression of the same idea, but when it comes to be judicially construed it is possible it may be found to have an altogether different effect. It is somewhat surprising that the Courts have not before now been called on to expound this section as it now stands in the Statute book, for it is obvious that some very nice points may be raised as to its true meaning. Under the Statute of 1877, it was tolerably plain that the mortgagees who were intended to be affected were those who had an existing charge upon the land in question before the work of the lienholder was commenced. And the equity of the provision when confined to such cases was reasonably plain. The mortgagee's security, after he had lent his money, might be enhanced in value by the lienholder, and to the extent to which it should be so enhanced in its actual selling value the lienholder was to have priority. But it may be open to question whether the present wording of the Statute may not carry the right of a lienholder beyond this equitable limit, so as to do a manifold injustice to a mortgagee. It all depends on what meaning the Courts may place on the words "prior mortgage" in this section (s. 5). If they are held to include every mortgage which is prior to the lienholder, then it may be found to work injustice. For instance, a mortgagee without actual notice of any lien, may advance his money on the security of the property after all, or a large part of, the work of the lienholder has been done upon it, and upon the value of the land as so improved. By prior registration of his mortgage he may acquire priority over the lien (see cases cited in Holmested's Mechanics' Lien Act, p. 9). This then becomes a "prior mortgage," but can it fairly be said to be a "prior mortgage" within the meaning of section 5, (3)? It has acquired its priority, not by virtue of its being prior at the time the work was commenced or done, but by virtue of the Registry Act, and the neglect of the lienholder to register his lien so as to retain his priority, and which if he had done possibly the mortgagee would not have advanced his money. These are facts which seem to take the case entirely out of the equitable principle on which the original Act was framed; because the security on which the mortgagee has advanced his money has not been subsequently improved or enhanced in value; but, on the contrary, if the claim of the lienholder to priority were allowed, it would be subtracting a material part of the original security from the mortgagee on the faith of which he had advanced his money, which would be obviously unjust. Such considerations as these, therefore, rather lead to the conclusion that the words "prior mortgage" must necessarily have a somewhat restricted meaning, and can only include mortgages which are actually prior at the time the work of the lienholder is done, and cannot include those which subsequently acquire priority by virtue of the Registry Act.

GRAND JURIES.

We observe that the Minister of Justice has recently issued a circular letter to all judges and Attorney-Generals of the various provinces of the Dominion, for the purpose of ascertaining their views on the important question whether

grand juries should, or should not, be abolished. Of late years the practical usefulness of grand juries has been much discussed, and many opinions pro and con have been given. The recent action of the Minister of Justice is likely to result in the gathering together of the opinions of those, who, being intimately concerned in the administration of justice, are perhaps best qualified to speak upon the question, and whose position will naturally entitle their opinions to the most respectful consideration.

Whatever may be the result of the answers sent in to the Minister of Justice, as to the desirability of abolishing or continuing grand juries, there can be no doubt that they have formed an important element in the criminal procedure of the mother country from a remote antiquity. Blackstone even finds in the institutions of Ethelred regulations concerning them. They have sprung from that sensitive regard which the laws of England have for so many generations had for the liberty of the subject, and which indeed is the foundation of all true liberty. Such an institution, hallowed by so hoary an antiquity, is not likely to be cast aside, unless it is made very manifest that it is to give place to a better system. That the grand jury has proved a wholesome barrier against frivolous and malignant accusations, there can be little doubt. And yet, like most institutions which have a wise and laudable reason for being called into existence, it is possible they may outlive their usefulness, and we would be in a sad state if the administration of the law had not from time to time undergone change.

Before a man can be punished for any serious crime, he may, if he insist on it, require the judgment of no less than twenty-four men, of whom twelve at least (the grand jury) are required to say whether a case is made out for putting him on his trial at all; and before he can be convicted, twelve others (the petit jury) must unanimously find him guilty of the offence with which he is charged. By this means it is sought to provide as far as possible a safeguard against unjust and malicious accusations for men of every degree. Such a protection is not to be lightly cast aside by any one who rightly values the life, liberty, and reputation of himself and his fellow-subjects.

It has been very strongly urged of late in some quarters that grand juries have outlived their usefulness; that they delay public business to suit their own convenience; that they are apt to overstep their province and to assume to try cases, instead of confining themselves to the simple question whether a *prima facie* case is made out; that they are liable to suffer themselves to be influenced by improper considerations, or the importunities or representations of the friends of accused persons; and that by this means legitimate subjects for trial and investigation before a petit jury are smothered in the grand jury room, and, in short, that instead of advancing the cause of justice, the grand jury, not infrequently, obstructs it. In addition to this, there is great force in the objection that there is no individual responsibility on members of the grand jury, and that this secret tribunal is as often used to gratify malevolent purposes as it is to choke off proper prosecutions. A man's best friends or his worst enemies may be on a grand jury, and there is no challenge, as in the petit jury, to secure a fair, impartial hearing. Then there is the absurdity of ignorant or a majority of

ignorant men (for selection is now a matter of chance) passing *privately* upon a case. If they are advised by the Crown prosecutor, and he is honest, they may do what is right, but they may take their own prejudiced views. If they do, who is to be held responsible? Everything connected with the administration of justice should be not only honest, but open as the day, and with appropriate responsibility. Strange as it may seem, the class of men on grand juries in Ontario are, as a rule, inferior even to those on the petit juries; and one or two bad men on the former may work great evil, and the want of challenge intensifies the evil. The liberal challenge allowed in serious cases helps to purify a petit jury.

All these considerations are, no doubt, important to be borne in mind in determining the value of the grand jury as an element in our criminal procedure; but it is also necessary to consider whether these evils of the grand jury system outweigh any advantages which attend it; and whether or not they can be corrected by a less drastic process than the total abolition of the grand jury. Certain it is, that if the grand jury system were abolished, some other means would have to be devised whereby the wholesome restraint it is intended to exercise over criminal prosecutions may still be retained. We may hereafter have something to say as to what would be the best way of meeting this need.

The recalcitrancy of grand juries is not any newly-discovered fault. It may be that in some parts of the country there is not a sufficiency of the class of educated and independent men from which grand juries ought to be drawn, and it may be necessary in the future, as it has been in the past, to supply some remedy for their backslidings. In England such remedies have practically now fallen into disuetude: the class which compose grand juries there, we presume, are sufficiently alive to their duty as citizens, and sufficiently independent fearlessly to perform it, to make it no longer necessary to resort to penal measures for their correction. But there was a time, even in England, when a grand jury which failed to do its duty could, upon the presentment of a new grand jury, impanelled for the purpose, be fined for their default. But it may be said that such a procedure as would dispense with grand juries has passed out of the region of general reasoning, for we have the fact that the experience of centuries of actual working has, in Scotland, established that justice can well be administered without the use of this venerable institution.

Truth fears nothing but to be concealed. The fullest enquiries should be made from well-informed quarters. When these enquiries are made, the Government will no doubt have sufficient light to see what change is necessary and can properly be made. A scheme will then doubtless be formulated. When that is done, ample time should be given for the fullest consideration. It has never been the province of this journal to prejudge or throw cold water on any attempt to obtain light with a view to improvement, and many of the most valuable changes that have taken place in the administration of justice in this country have first been suggested in the pages of this journal.

The learned Senator from Barrie (than whom no one is more competent to form an opinion on this subject) has directed the attention of the Government

to the matter, and the latter has done well to seek information and opinions from well-informed quarters. When that information is made public, we think it will be seen that his views, so well and fully expressed in his speech in the Senate, meet the approval of the best judges. It is of so much importance that we shall return again to the subject. In the meantime the matter is laid before the profession, that their thought may be directed to it, and a full discussion is invited.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The law reports for November comprise 25 Q.B.D., pp. 485-522; 15 P.D., pp. 185-188; 45 Chy.D., pp. 85-285; and 15 App. Cas., pp. 309-451.

COMPANY—DIRECTORS ACTING ULTRA VIRES—LIABILITY OF DIRECTOR FOR ILLEGAL ACTS OF CO-DIRECTORS—DAMAGE—REMOTENESS.

Culler v. *The London & Suburban G. P. Building Society*, 25 Q.B.D., 485, was an action by a director against a building society to recover a deposit, in which the company set up a counter-claim against the defendant for damages, (*a*) for losses sustained by the society by reason of the plaintiff having, as a director, been a party to the lending of the money of the society on insufficient security, and (*b*) for having also been a party to a resolution approving of the money of the society being lent on unauthorized securities. As to the first ground, the judge at the trial found that there had not been any dishonesty or culpable negligence on the part of the plaintiff, but at the most a mere error in judgment, and the defendants' counter-claim on this ground therefore failed. As to the other ground, the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.) agreed with Mathew, J. (the judge at the trial), that the plaintiff was not liable, because though the resolution in question approved the principle of lending moneys on certain unauthorized securities, and, therefore, was clearly *ultra vires*, yet it was not the actual cause of the defendants' loss, which was occasioned by the subsequent action of other directors (to which the plaintiff was not a party) in authorizing the loans to be made pursuant to the previous resolution—and for this the plaintiff was not liable, as he was not a party to it. In short, in the judgment of the court, the resolution, to which the plaintiff was a party, did the defendants no harm; the damage was occasioned by acting upon it.

INN-KEEPER—LIEN ON GOODS OF GUEST—CREDIT GIVEN TO HUSBAND—LIEN ON SEPARATE PROPERTY OF WIFE.

Gordon v. *Silber*, 25 Q.B.D., 491, raises a new kind of question under the Married Woman's Property Act. A husband and wife go to an hotel, the landlord gives credit to the husband, but he becomes bankrupt and unable to pay the bill, and the landlord then claims a lien on the luggage of both husband and wife, but the latter claims that hers is exempt from liability because it is her separate property under the Act. Lopes, L.J., before whom the action was tried without a jury, while holding that the inn-keeper could not sue the wife for the amount remaining due to him because credit had been given to the husband alone, nevertheless held that he had a valid lien on her goods for the amount, by virtue of which he could retain them until he was paid.

EVIDENCE—WITNESS—PRIVILEGE ON THE GROUND OF PUBLIC POLICY.

In *Marks* v. *Beyfus*, 25 Q.B.D., 494, the question is discussed whether the Director of Public Prosecutions, an officer appointed under 42 & 43 Vict., c. 22, can, when called as a witness, be compelled to disclose the name of the informer and the information he had received, which led to a public prosecution being instituted by him, and the Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.) affirmed the Divisional Court (Lord Coleridge, C.J., and Mathew, J.) in holding that he could not, and that such information can only be disclosed when the judge at the trial of the prisoner is of opinion that the disclosure of the name of the informant or the nature of the information is necessary or desirable in order to show the prisoner's innocence. Lord Esher was of opinion that the same rule applied where a subsequent civil action is brought for malicious prosecution.

SHIP—BILL OF LADING—CONSTRUCTION.

Serraino v. *Campbell*, 25 Q.B.D., 501, involves a somewhat curious case of construction. Goods were shipped under a bill of lading providing that the goods were to be delivered, "the act of God, the Queen's enemies, fire, and all and every other dangers, and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto order or to assigns, they paying freight for the said goods, *and all other conditions as per charter*, with average accustomed." In the charter party were the words, "Negligence claim as per Baltic Bill of Lading, 1885," and amongst the perils excepted by the Baltic Bill of Lading, 1885, were stranding, occasioned by the negligence of the master or crew. Owing to the negligence of the master the vessel was stranded and the goods lost; and the question Huddleston, B., had to decide was whether the words, "and all other conditions as per charter," incorporated the negligence clause above referred to in the charter party, to which the plaintiffs, who were indorsers of the bill of lading, were no parties—and he held that they did not, and that the ship-owners were liable for the loss. The reason of his judgment may be gathered from the following passage: "I am of opinion that the words 'all other conditions' must be connected with the words 'paying freight for the coals,' and include only such conditions as are *ejusdem generis* with the payment of freight, importing into the bill of lading so much of the charter-party as is referable to the subject matter of the discharge and receipt of cargo at the port of discharge, and do not include a clause which would add to the exceptions already recited and very materially alter the contract on the face of the bill of lading," p. 503.

UNDUE PREFERENCE.

In re Skegg, 25 Q.B.D., 505, may be briefly noticed here because the Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.) held that when a debtor, on the eve of bankruptcy, was sued by a creditor, and did not appear, and was subsequently sued by two other creditors, whose writs he took to the solicitors of the creditor who had first sued, and asked them to do what was necessary, and they entered an appearance, and in consequence the first creditor got judgment

and execution sooner than the other creditors—this constituted an "undue preference" of the first creditor within the Bankruptcy Act, 1883, s. 28. This case seems somewhat to conflict with the decisions of our own court in *Young* v. *Christie*, 7 Gr., 312, *McKenna* v. *Smith*, 10 Gr., 40, and *Labatt* v. *Bixel*, 28 Gr., 593.

COMPANY—SALE OF SHARES—MISREPRESENTATION BY COMPANY—ESTOPPEL.

In *Bishop* v. *Balkis Consolidated Co.*, 25 Q.B.D., 512, the Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.) affirmed the judgment of Williams, J., noted *ante* p. 427; but dissented from the reasons on which he based his judgment. It may be remembered that the action was brought against the company to recover the damages which the plaintiff had sustained in consequence of his having carried out a purchase of shares of the company on the faith of a representation by the secretary of the company that the certificates of the shares for the purpose of the transfer had been lodged with the company. The certificates had been lodged on a prior transfer of the same shares, and not for the purpose of the transfer to the plaintiff; the secretary simply certified in the transfer to the plaintiff, "certificate lodged," which, in the ordinary course of business, would mean, and was intended to mean, that the certificate had been lodged for the purpose of the transfer to the plaintiff. On the plaintiff applying to complete his title, the fact of the prior transfer was discovered, and the company refused to register the plaintiff as owner. Williams, J., held that the certificate of the secretary was a representation as to credit and ability within Lord Tenterden's Act (R S.O., c. 123, s. 7), and was therefore void, because not under the seal of the company. He also considered it *ultra vires* of the company. But the Court of Appeal differed with him on both these grounds, and held that the certification was not *ultra vires*, and not within Lord Tenterden's Act, but that no action would lie against the company because the representation, though made carelessly, was made without fraud, and therefore not actionable, according to *Peek* v. *Derry*, 14 App. Cas., 337. They were also of the opinion that the certificate did not amount to a warranty of the transferror's title, but was only a representation that a document had been lodged with them apparently in order, and showing *prima facie* that the transferror was entitled to the shares; but that the company were not estopped thereby from disputing the title of the plaintiff's transferror. When the result of *Peek* v. *Derry* is stated in the bold and naked way in which Lindley, L.J., states it, one cannot help doubting the accuracy of that case, which has been assailed by much adverse criticism. But for that case the plaintiff would have been entitled to succeed in this action, and where one of two innocent parties is to suffer, it certainly does seem more in accordance with natural justice that the one who has by his carelessness brought about the loss should be the one to suffer, rather than the other, who, through his carelessness, has been misled.

PROBATE—TWO WILLS.

In re Grane de la Rue, 15 P.D., 185, is a similar case to *Re Callaway*, 15 P.D., 147, which was noted *ante* p. 455. Here the testator had made one will confined

exclusively to his English property, and the other exclusively to his property in Switzerland and Italy. Probate was granted of the English will alone on a copy of the other will being filed.

COMPANY—WINDING UP—EXAMINATION OF WITNESS—COMPANIES ACT, 1862 (25 & 26 VICT., C. 89), S. 115—(R.S.C., C. 129, S. 81.)

In re North Australian Territory Co., 45 Chy.D., 87, the liquidator of a company being wound up had, with the leave of the Court, brought an action against another company, and had in the action endeavored to obtain discovery of certain documents in the possession of the defendant company, which the Court refused on the ground that no defence having being put in, the application for the discovery was premature. The liquidator, in order to evade the effect of this decision, then obtained an order for the secretary of the defendant company to be examined as a witness in the winding-up proceedings under s. 115 of the Companies Act, 1882 (R.S.C., c. 129, s. 81); the secretary did not appeal from this order, but on appearing for examination refused to answer a question relating to the matter in issue in the action. Upon this the liquidator moved to compel him to attend again at his own expense and answer the questions, but inasmuch as he failed to show any reason for seeking the discovery except to aid him in the action, and so to evade the order postponing discovery in the action, the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.), reversing the order of Kekewich, J., held that the witness was justified in refusing to answer the questions. The rule, therefore, which may be deduced from this case seems to be this, that when an action has been brought by a liquidator of a company being wound up he must confine himself to the proper procedure in that action for the purpose of getting discovery, and cannot resort to the provisions of R.S.C., c. 129, s. 81, to get indirectly what he could not get directly in the action. At the same time it must be remembered that this is not a hard and fast rule, but one that may be relaxed if justice requires it.

PRACTICE—FURTHER CONSIDERATION—ORDER TO PAY COSTS OUT OF FUND IN COURT—SUBSEQUENT APPLICATION TO APPORTION COSTS AGAINST REALTY AND PERSONALTY.

In re Roper, Taylor v. *Bland*, 45 Chy.D., 126, a question of practice of some importance came before the Court of Appeal, from Kay, J. A testatrix bequeathed a mixed fund of pure personalty and money to arise from realty directed by her will to be sold to her sisters for life and then to a charity. This was a suit to administer the estate, and on further consideration (or as we should say here, on further directions), the costs of suit and certain legacies were ordered to be paid out of a fund in court (part of which arose from realty and part from pure personalty), so far as it would extend, and the deficiency to be raised out of a sum of stock in court which represented realty. There was no reservation of any subsequent further consideration, nor of the question how the costs should be ultimately borne. The dividends on the residue of the stock were ordered to be paid to one of the parties for life, with liberty to apply on the death of the tenant for life. The testatrix's heir-at-law applied for payment out of the fund to him as being realty; but the Attorney-General, for the charity,

objected that the costs of administering the realty should have been paid exclusively out of the proceeds of the realty, in which case there would have been a substantial sum of pure personalty left for the charity. Kay, J., considered that the order on further consideration had concluded the question how the costs were to be borne, and ordered payment to the heir. Fry, L.J., agreed with Kay, J., but the other members of the Court of Appeal (Cotton and Bowen, L.JJ.) considered that the Attorney-General's contention was correct as to the mode in which the costs should be paid, and that the order on further consideration, containing no declaration as to the ultimate incidence of the costs, nor any indication of any intention to decide that question, must be treated as having directed the payment of costs generally out of the fund, merely for convenience, and not with any intention of altering the rights of the parties, and was, therefore, no obstacle to the court now setting the matter right, as the fund was still under its control.

LEGACY TO CHARITY—PURE PERSONALTY—MUNICIPAL BONDS—MORTMAIN—9 GEO. 2, C. 36, S. 3.

In re Thompson, Bedford v. *Teal*, 45 Chy.D., 161, though turning to a large extent on the effect of certain Imperial Statutes, may nevertheless be referred to as furnishing the latest views of the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) on the much-debated question as to what constitutes an interest in land within the Mortmain Act, 9 Geo. 2, c. 36, s. 3, out of which legacies to charities can not properly be paid. The fund in question in this case was secured by municipal bonds, which were made a charge on the surplus which might remain of the Borough fund after making certain payments. The Borough fund was partly derived from rents of land. The Court of Appeal held (overruling Stirling, J.) that the bonds in question did not give an interest in land within the meaning of 9 Geo. 2, c. 36. A statute provided that the proceeds of the sale of any surplus lands were also to be carried to the Borough fund; but as it was not shown that there were any surplus lands, the court held that the debentures, which were a charge on the fund, must be treated as pure personalty. It is by no means clear, even if it had been shown that there were surplus lands, that that would have made any difference. In the course of the argument, Fry, L.J., propounded the following question: "Suppose you place a tub under your apple tree, and give a charge upon such apples as fall into it, is that an interest in land?" to which the learned counsel replied, "Yes, because the apples being now on the tree are part of the land." Whether that is a satisfactory answer to the question, we must leave our readers to judge.

POWER OF APPOINTMENT—REAL ESTATE—INVALID EXECUTION OF POWER—POWER TO APPOINT IN TAIL DOES NOR WARRANT APPOINTMENT FOR LIFE.

In re Porter, Porter v. *Dequetteville*, 45 Chy.D., 179, the validity of an assumed exercise of a power of appointment was called in question. The facts were that a husband and wife, having a general power of appointment, over real estate under a deed dated 5th September, 1837, by a deed dated the 9th September, 1837, exercised that power by appointing to themselves successively for life, with remainder to such of their children in tail, and in such manner as they should

by deed appoint, with remainder to the children as tenants in common in tail. Subsequently by another deed made in 1855, which recited the deed of 5th September, 1837, but did not refer to the deed of the 9th September, 1837, and reciting their intention to exercise the power in the deed of the 5th Sept. the husband and wife, in exercise of that power "and of every other power or authority enabling them in that behalf," purported to appoint the property to themselves successively for life, with remainder to their son Edward for life, with remainder over to Edward's issue. The husband and wife afterwards died, leaving several children besides Edward. The question was whether this appointment of 1855 could be deemed a valid exercise of the power contained in the deed of the 9th September. North, J., held that it was not, because there was no intention to exercise that power, and the Court of Appeal (Cotton, Lindley, and Fry, L.JJ.) agreed with him; Lindley, L.J., was also of opinion that that power only authorized an appointment in tail, and neither authorized an appointment to the son Edward's issue, nor the appointment of a life estate to him.

MORTGAGE—FETTER ON REDEMPTION—POLICY OF LIFE INSURANCE AS COLLATERAL SECURITY.

The case of *Marquess of Northampton* v. *Pollock*, 45 Chy.D., 190, illustrates in a very striking and forcible way the rule that all attempts to fetter a mortgagor in his right of redemption on payment of the debt, interest, and costs, are nugatory in a Court of Equity. In this case an insurance company advanced to the late Earl Compton £10,000 on the security of a reversionary interest to which the Earl was entitled contingently on his surviving his father. In accordance with the contract between the parties, the insurance company insured the life of Earl Compton against that of his father for £34,500 in their own office, and provided the premiums until his death. The reversion was charged with principal and premiums and compound interest thereon. It was stipulated that in the event of Earl Compton dying in the lifetime of his father that the proceeds of the policy should belong to the insurance company absolutely. Earl Compton did die in the lifetime of his father without having paid anything in respect of interest, premiums, or principal; and the plaintiff, as his administrator, claimed to be entitled to a declaration that the defendants (who were trustees of the insurance company) were entitled to the insurance moneys as a security only for what was due them, and that he was entitled to any balance that might remain after payment thereof. This relief North, J., held the plaintiff entitled to, and his decision was affirmed by the majority of the Court of Appeal (Cotton and Lindley, L.JJ., Bowen L.J., dissenting). Many such transactions would be fatal to the insurance company. They advanced £10,000, the original loan, and for premiums £3450, making altogether £13,450, and had to pay up £34,500 less the £13,450 and interest thereon. But of course the Court had to treat the case just as if the insurance had been effected with some other insurance company, the mere fact that on this particular policy the defendants, as insurers, had made a loss, could not affect the legal rights of the parties as mortgagor and mortgagees. It is not often, however, that a borrower comes out of a transaction of this kind quite so satisfactorily to himself. It may be well also to observe

that if the defendants' contention had prevailed, they would have been entitled to keep the whole of the £34,500 secured by the policy, and at the same time to sue the plaintiff as representative of Earl Compton, not only for the £10,000, but also for the premiums paid for keeping the policy on foot. Lord Justice Bowen's dissent, it may be observed, was based on the fact that in his view the policy was not a part of the mortgage security, and that by the stipulation of the parties, the mortgagor was merely to have the right to become the owner of it in his lifetime, on paying what was due. He thought that the presumption which would arise in favor of the policy being the property of the mortgagor, from the fact that he was to be charged with the premiums, was displaced by the express agreement of the parties to the contrary.

MORTGAGE OF PERSONALTY—INTEREST AFTER DAY COVENANTED FOR PAYMENT—ARREARS OF INTEREST.

In *Mellersh* v. *Brown*, 45 Chy.D., 225, an attempt was made, unsuccessfully, to persuade Kay, J., that in a foreclosure action brought on a mortgage of a reversionary interest in personal estate, the Court should, by analogy to the Statute of Limitations relating to land, allow no more than six years' arrears of interest, and also that, there being no covenant for payment of interest after the day fixed for payment, the rate reserved by the mortgage (which was 5%) ought not to be allowed. But Kay, J., scouted the idea that there was any analogy in regard to land, there was a statutory limit as to the arrears recoverable, whereas as regards personal estate there was not, and therefore all the interest recoverable on the covenant must be paid as the price of redemption; and that the rate reserved being no more than a jury would be directed to give by way of damages for the detention of the money after the day fixed for payment, there was no reason or authority for allowing the mortgagee any lower rate. The question here discussed as to the rate of interest payable after the day of payment has been several times of late discussed in our own Courts, and it may be useful here to notice a passage from the judgment of Cotton, L.J., *In re Roberts*, 14 Chy.D., 52, which is cited by Kay, J., in which that learned judge intimates that there may be a difference in the rate allowed in an action on the covenant, and in a suit for foreclosure or redemption, a distinction, we may observe, touched upon by Boyd, C., in *Muttlebury* v. *Stevens*, *ante* vol. 23, p. 12. The passage we refer to is this, "It is only necessary for me to add that we are not deciding now what rate of interest should be allowed in a suit for redemption, but simply in an action brought for breach of covenant to pay the money on a given day," which Kay, J., states he takes to mean this: "If the mortgagor were coming here to ask for redemption, it is very possible we might say to him that he should not redeem without paying the higher rate; but as it is only a question on the covenant which does not expressly reserve interest after the day named for payment, we will fix as damages a rate of interest lower than that for which the mortgage deed itself stipulates."

PRACTICE—SERVICE OF WRIT—DEFENDANTS SUED IN FIRM NAME—FOREIGN PARTNER—DISSOLUTION OF FIRM BEFORE ACTION—SERVICE ON MANAGER—ORD. IX., R. 6; ORD. XVI., R. 14 (ONT. RULES 265, 317).

Shepherd v. *Hirsch* 45 Chy.D., 231, is a decision of Chitty, J., on a point of

practice. The writ was issued against the defendants by their firm name. The firm had been dissolved without (as the judge found) the plaintiff's knowledge, before action (see Ont. Rule 317). One of the partners was domiciled in England; the other was a foreigner, domiciled in France. The writ was served on the manager at the place where the business of the firm purported to be carried on. The Frenchman applied to set aside the service, on the ground that at the time of service and when the writ was issued he was the sole owner of the business, and under *Russell* v. *Cambefort*, 23 Q.B.D., 526 (see *ante* p. 8), he could not be sued by serving the manager. Chitty, J., however, held that under Ord. ix., R. 6 (Ont. Rule 265), coupled with the proviso to Ord. xvi., R. 14 (Ont. Rule 317), service on the manager was good service on the firm, notwithstanding one of its members was a foreigner, domiciled abroad, and notwithstanding the dissolution—because service on the manager was good service on the member of the firm in England, and service on one partner was good service on all, according to *Pollexfen* v. *Sibson*, 16 Q.B.D., 792, notwithstanding some of them were out of the jurisdiction, and therefore he held the Frenchman was well served.

COMPANY—RESERVE FUND—DIVIDEND—BONUS—CAPITAL OR INCOME—TENANT FOR LIFE.

In re Alsbury, Sugden v. *Alsbury*, 45 Chy.D., 237, a question arose similar to that discussed in *Worts* v. *Worts*, 18 Ont., 332, as to whether bonuses paid to shareholders of a company out of a reserve fund were to be deemed capital or income. The memorandum of association of the company provided for increase of capital. The articles provided that the directors might declare dividends, and before recommending a dividend they might set aside out of profits a reserve fund for contingencies, equalizing dividends, and other specified objects, and that they might declare and pay interim dividends. Shares in the company were settled by will. At the testator's death, the reserve fund was £3,000; subsequently it was increased to £9,000. The directors thereafter resolved to divide £15,000, as "special bonus," and this amount was paid as "interim dividend," in April, 1889. About £5,000 of extraordinary expenses were incurred, and a further dividend of £10 per share was paid, in November of that year, when the reserve fund was reduced to £2,000. North, J., held that the tenant for life of the settled shares was entitled to the whole amount divided as income of the shares. In *Worts* v. *Worts*, 18 Ont., 332, a similar conclusion was arrived at.

TRUST—ADMINISTRATION—OVER-PAYMENT TO BENEFICIARY—LIABILITY OF BENEFICIARY TO REFUND OVER-PAYMENT.

In re Winslow, Frere v. *Winslow*, 45 Chy.D., 249, was an action for the administration of a testator's estate, which was divisible among the testator's two sons and two daughters. It appeared that the estate had been managed for a long time by one of the executors, who had paid large sums, in respect of their shares, to each of the beneficiaries, but to the sons more than to the daughters—and the residue of the estate was now insufficient to equalize the shares. Under these circumstances, it not being shown that the deficiency had not arisen from a wasting of the estate subsequent to the payments to the sons, North, J., held

that the sons who had been over-paid were not trustees for the excess they had received over their sisters, nor bound to refund it in order to equalize the shares of the latter; but as the excess paid to one of the sons was larger than the amount of his costs, he was held not entitled to be paid them out of the residue of the estate.

PRACTICE—THIRD PARTY PROCEDURE—ORIGINATING SUMMONS.

In re Wilson, Attorney-General v. *Woodall*, 45 Chy.D., 266, North, J., held that the third party procedure could not be resorted to in proceedings commenced by an originating summons. We presume the same rule would apply to proceedings commenced under our practice in a summary way (see Ont. Rules, 965, 989, 992, etc.)

WILL—POWER OF APPOINTMENT—DEATH OF ONE OF OBJECTS IN LIFETIME OF DONEE, EFFECT OF—COVENANT TO SETTLE WIFE'S PROPERTY.

In re Ware, Cumberlege v. *Cumberlege-Ware*, 45 Chy.D., 269, is another case on the law of powers. In this case the question arose on the construction of the will of a testator, who had left two sums of £10,000 to his nephew John, and niece Ann, for life, with power to them to appoint the capital "to their brothers or sisters, Charles, Samuel, and sister Catharine," and in default of appointment, then the money was to be equally divided between the three persons named, or their respective representatives. The objects of the power all survived the testator, but Catharine died during the lifetime of the donees of the power—John and Ann. John, by will, appointed one-third of his £10,000 to Charles, and the other two-thirds to Samuel, both of whom survived him. Ann, by her will, appointed her £10,000 to Charles and Samuel, in equal shares. Samuel survived her, but Charles predeceased her. The trustees of the will of the original testator now applied for the opinion of the court as to who was entitled to the £20,000. The first question was whether the power could be exercised at all, and if at all, whether as regards the whole fund, or two-thirds only. Stirling, J., held, that notwithstanding Catharine having died in the lifetime of the donees, the power continued in force and extended to the whole fund, and that the appointment was valid, except as to the share appointed by Ann, in favor of Charles, which had lapsed. This being the case, the question then arose as to who were entitled to this £5,000, as to which the appointment failed, and this depended on the meaning to be attached to the word "representatives," and Stirling, J., decided that it meant the executors or administrators of the person represented—and not his next of kin (see, however, *Burkett* v. *Tozer*, 17 Ont., 587, where the context was held to give the word "representatives" the meaning of "next of kin"). Consequently the personal representatives of Charles, Samuel, and Catherine, were held entitled to the £5,000. As regards Catharine's share of this fund, a further question arose: By her marriage settlement, made in 1843, her husband had covenanted to settle all "other personal estate which, upon the said intended marriage, or at any time during the said intended coverture, shall come to or vest in the said husband in right of his intended wife, or in her, the said wife, by bequest, gift, or otherwise." Catharine died in 1867, her husband surviving her.

Both the donees of the power survived her, and the question was, whether her share of the unappointed £5,000 was bound by the covenant for settlement? On behalf of the husband it was contended it was not indefeasibly vested in possession during the coverture, but during the lifetime of the donees of the power was always liable to be divested. But Stirling, J., held that during coverture the share had vested in interest, though not in possession, and was therefore bound by the covenant, notwithstanding it was liable to be divested by the exercise of the power.

Notes on Exchanges and Legal Scrap Book.

WHO says the profession in the Province of Quebec are behind the age in advertising capacity?

The following unique specimen begins with the name of a man so modest that for worlds we would not divulge his name or drag it before an admiring public. Let it suffice that he is a B.C.L., as well as: "Advocate, Counsellor at Law, etc. Revising Barrister for ———. Attorney for Legal and Commercial Exchange of Canada. Associate Attorney for Wilbers' Mercantile Agency and others. Collections and Legal business of every description promptly executed. Attends all Provincial Courts. Capias, Attachments, and Seizures made. Ejectments and Real Estates actions brought. Institutes Insolvency proceedings, fyles claims and attends Creditors' meetings, winding up and distribution of assets. Suits for damages for personal wrongs or damages to property entered. Examines titles, searches Mortgage records, Personal and Real. Sues for maintenance and support between parents and children and ascendants. Separation of property and otherwise between consorts obtained. Pauper and Lunacy laws invoked. Prosecutes and defends in criminal cases in all stages before Justices, Magistrates, and the High Courts. Takes extra-judicial declarations and affidavits anywhere. Draws Marriage contracts, Wills, Leases, Mortgages, Bills of Sales, etc., etc. Attends and closes up Probate matters, and Successions. Manages Estate for heirs, Collects rents, Insurance claims, etc. Furnishes Legal opinions on matters in any State or Country and provides Counsel there. Draws Petitions, private Bills, incorporating Acts for Municipalities or Corporations and appears before Legislative Committees. Bills, Notes, Drafts, I.O. U.'s and Mercantile papers realized upon. Municipal cases a speciality."

A TREE DEEDED TO ITSELF.—A tree a property holder. What do you think of that? Is it legal? If so, when the tree dies to whom does the land belong? If not, whose is it now? It is certainly an exceptional case, and nobody ever heard of such a thing before. There are only a few in the city who know it, as it was done so long ago as to pass out of the recollection of nearly all. However, it is true, as the records of deeds at the Court House contain the one

giving the tree itself and all the land within eight feet of it. The tree in question is the magnificent oak in front of the residence of Major Stanley, and it seems to stand straighter and hold its head more highly and proudly, as if it knew that it ranked above the common trees of the world, which are the slaves of humans, and can be cut down and burned at the will of their owners. This majestic oak cannot be touched against its will, but the trouble is to ascertain what its will may be. And who is to be judge of whether it is willing to be cut down or not? It is a peculiar case. The facts as told us are these: Way back in the first part of this century the land containing the tree and that taking in a good part of the vicinity was owned by Col. W. H. Jackson. Col. Jackson had watched the tree grow, from his childhood, and grew to love it almost as he would a human being. Its luxuriant foliage and sturdy limbs had often protected him from the heavy rains, and out of its highest branches he had many a time gotten the eggs of the feathered songsters. He watched its growth, and when, on reaching a ripe old age, he saw the tree standing in its magnificent proportions, he was pained to think that after his death it would fall into the hands of those who might destroy it. Thinking thusly, he came to the conclusion that the only way to be sure of its protection from the axe of the unsparing woodsman was to allow it to become its own master. And this he did. Going to the Court House, he had there recorded a deed, from which the following is an extract: "I, W. H. Jackson, of the county of Clarke, of the one part, and the oak tree (giving location) of the county of Clarke, of the other part; Witnesseth, That the said W. H. Jackson for and in consideration of the great affection which he bears said tree, and his great desire to see it protected, has conveyed, and by these presents do convey, unto said oak tree entire possession of itself and of all land within eight feet of it on all sides."—*U. S. Paper.*

ETHICS OF JOURNALISM.—A curious case, illustrating the ethics of French journalism, has lately been tried in Paris before a jury. It grew out of the celebrated political trials of Boulanger, Rochefort, and Dillon. The offence consisted of abstracting from the court, a few days before the trial, a number of depositions, and printing them in a newspaper. Three persons were prosecuted for these acts, two journalists and the person who abstracted the volume, and all three were acquitted by a French jury. According to an account of the trial given in *Revue Bleu* for April 26, the question submitted to the jury was: "Has a newspaper the right to publish a secret document, one that must have been stolen, with the knowledge that it was stolen?" Journalists and managers of newspapers called before the bar as experts showed a touching unanimity in their evidence, and all proclaimed what they called the rights of the press. Journalists of one class said: "I have no opinions. My business is to get the news, and to give it to the public. Whenever a document falls into my hands that I think is capable of interesting, I hasten to publish it;" some adding, "lest a competitor should forestall me," and one expressed the reserve, "unless it should work harm to my country." Another class said: "I serve a party. I am a party man, a fighter. Any document that promises to aid the cause that I

defend, I use without hesitation. Any weapon is good with which I can strike a blow at the enemy." When the Advocate-General asked: "Would you publish a document knowing it to be stolen?" some replied frankly, "Yes, even knowing that it was stolen;" one answered, with a smile, "Oh, I am not inquisitive;" and one made the still neater response, "There is no theft in the case; it is simply expropriation in the interests of the public."—*Pump Court.*

SPECIFIC PERFORMANCE OF AGREEMENTS BY LETTERS.—Numerous decisions have established the fact that an agreement for the sale and purchase of realty so as to satisfy the requirements of the Statute of Frauds, may be entered into by letters passing from one person to another, when such letters contain all the terms of the bargain. Where there is an offer to sell a specified property at a given price by one party, and a simple acceptance of that offer by the other, no difficulty arises. But where the acceptance is accompanied by some new stipulation, or exception, or where the parties show by subsequent negotiation in the matter that they do not consider the letters to amount to a complete and final agreement, as where both of them afterwards seek to introduce new conditions into the bargain, it then becomes a question whether there is an agreement that can be specifically enforced at the suit of either party. Recent cases on this subject, though somewhat difficult to reconcile on some points, agree in others; and it appears to be now established by several decisions that the fact that a simple acceptance of an offer contains a statement that the acceptor "has instructed his solicitor to prepare a formal agreement" does not render such acceptance a conditional one. If the true and essential ingredients of a contract, the parties to the bargain, the description of the property and the price to be paid, be clearly stated, then although the contract may not be set forth in the form which a solicitor would adopt if instructed to draw up the agreement in writing, an acceptance by letter will not the less constitute an agreement between the parties merely because the latter may say, "We will have this agreement put in due form by a solicitor:" (see *Rossiter* v. *Miller*, 39 L.T. Rep., N.S. 173; 3 App. Cas. 1124; *Bolton Partners* v. *Lambert*, 60 L.T. Rep., N.S. 687; 41 Ch.Div. 295, C.A.) And it would seem that the fact that the acceptance concludes with the words "subject to the title being approved by our solicitors," does not make such acceptance a conditional one—these words seemingly meaning nothing more than a guard against the title being accepted without investigation, but that it should be subject to investigation in the usual way: (*Hussey* v. *Horne-Payne*, 41 L.T. Rep., N.S. 1; 4 App. Cas. 311.)

In the recent case of *Bolton Partners* v. *Lambert* (*supra*) the facts, sufficient for our purpose, were these: After some preliminary verbal negotiations between the parties, the defendant, on the 8th Dec., 1886, wrote to the plaintiffs offering to take from them a lease of their works for the remainder of the plaintiffs' term, at a yearly rent of £3,500 payable quarterly, with an allowance of £500 from the first quarter's rent on account of repairs, etc. On the 9th of that month Mr Scratchley, a director of the company, wrote to the defendant, stating that h

offer should be laid before the board; and on the 13th Dec. he again wrote to the defendant, stating that the directors accepted the offer made in his letter of the 8th inst., and added that "the company's solicitors had been instructed to prepare the necessary documents." On the 13th Jan., 1887, however, the defendant wrote to the plaintiffs, alleging that he had discovered that he had been misled as to the value of certain of the plant and machinery on the premises, and added, "I therefore withdraw all offers made to you in any way." In an action by the company seeking specific performance of the alleged agreement contained in the letters of the 8th and 13th Dec., 1886, Mr. Justice Kekewich decided in their favor; and from his judgment the defendant appealed. The Court of Appeal held that these two letters constituted a complete and final contract; that the statement in the letter of Mr. Scratchley of the 13th Dec., 1886, as to the preparation of the necessary documents by the company's solicitors, did not render it a conditional acceptance; and that the letter by the defendant of the 13th Jan., 1887, withdrawing his offer was ineffective as having been made after the contract was complete; and the court confirmed the judgment of Mr. Justice Kekewich.

On the other hand it appears to be settled that the Court will not grant specific performance of an alleged agreement by letters, when looking at the whole correspondence and the conduct of the parties in continuing negotiations, not on a mere matter of form, but on some substantial question involved, after the offer and acceptance, it appears they did not consider the agreement complete and final. Thus, in *Hussey* v. *Horne-Payne* (*supra*), after some preliminary verbal negotiations, the defendant, on the 4th Oct., 1876, by letter offered the land in question to the plaintiff for £37,500. The plaintiff's agent on the 6th Oct. wrote in answer accepting the offer, subject to the title being approved by his solicitors. Further negotiations, however, followed by letter passing between the parties and their solicitors and by written memoranda, as to the payment of the amount of the purchase money by instalments, and as to the conveyance of the property as the purchase money was paid, wherein reference was made to the signing of a contract, but no such contract was signed. The plaintiff claimed specific performance of an alleged contract contained in the letters of the 4th and 6th Oct., with a declaration that the terms respecting payment of the purchase money and the conveyance of the property were also binding on the parties. But it was held by the House of Lords, that although the two letters, if they had stood alone, would have been sufficient evidence of a concluded contract under the Statute of Frauds they must be read in connection with the other correspondence and negotiations, whereby it appeared that there were to be other terms which at that time had not been agreed upon; that efforts were made to settle those other terms, and that such efforts did not result in a settlement thereof, and therefore there was in fact no completed agreement between the parties of which specific performance could be decreed. A recent case to the same effect is that of *The Bristol, Cardiff, and Swansea Aerated Bread Company* v. *Maggs*, 62 L.T. Rep. N.S. 416, decided by Kay, J. The facts are briefly these: On the 29th May, 1889, the defendant Maggs wrote to the plain-

tiffs offering to sell his business at Cardiff, lease, and goodwill for £450; fixtures and fittings, and stock-in-trade to be taken at a valuation; the offer to hold good for ten days. On the 1st June following, Colonel Guthrie, a director of the company, on behalf and with the authority of the company, wrote stating that he accepted the defendant's offer. On the 2nd June the defendant's solicitor sent to Colonel Guthrie a formal memorandum of agreement, which contained several new terms, for approval. This memorandum was altered by the plaintiff's solicitors, mainly by the insertion of a clause preventing the vendor for five years from carrying on a like business within Cardiff, or within a distance of five miles from the town hall, and returned the memorandum on the 4th June with an accompanying letter. On the 5th June the defendant's solicitor wrote sending the draft again to the plaintiff's solicitors with a modification of the proposed additional clause. On the 6th June the plaintiff's solicitors wrote stating that they could not themselves agree to the proposed modification; but they had asked Colonel Guthrie to call about it. On the 7th June the defendant's solicitor wrote stating that Colonel Guthrie had not called, and by his client's instructions he begged to inform them that his client "declined to proceed further in the matter." In an action by the company for specific performance of the alleged agreement by the two original letters, Mr. Justice Kay held that he was bound to look at the whole correspondence from beginning to end; and that although the two letters relied upon would, if nothing else had taken place, have been sufficient evidence of a complete agreement, yet the plaintiffs themselves had shown that the agreement was not complete by reopening the matter and stipulating afterwards for an additional term, not on a mere matter of form, but of considerable advantage and importance to them, which kept the whole matter of purchase and sale in a state of negotiation only; and that therefore the defendant was at liberty to put an end to the negotiations, as he did by withdrawing his offer, although the ten days named in his letter of the 29th May had not elapsed.—*Law Times.*

LIFE INSURANCE.—When a person effects an insurance on his own life, and in the policy designates another person as payee of the sum insured, the latter may maintain an action on the policy, without showing an insurable interest in the life: *Vivar* v. *Supreme Lodge K. of P.* (N.J.) 20 Atl., 36. [And this it would appear, without any acceptance by the company, and there being no privity of contract between the plaintiff and the company.]

PEINE FORT ET DURE.—In January, 1720, two highwaymen, named Spiggot and Phillips, refused to plead until the effects taken from their persons were restored to them. Thereupon they were sentenced to be pressed to death in the Press-room at Newgate. Phillips was terrified, and begged to be taken back to plead, which, as a mercy, he was permitted to do, although in strict law he could have been denied the request. His companion, however, was pressed, and bore

the amazing weight of three hundred and fifty pounds for the space of half-an-hour; but when an additional fifty pounds were added, his fortitude gave way, and he begged to be allowed to plead. They were, of course, both hanged. The following year another highwayman, named Hames, refused to plead. In vain was the dreadful alternative explained to him. He continued mute, and was taken to the Press-Room, and bore a weight of two hundred and fifty pounds for seven minutes, when he cried out to be taken back to court. He too was hanged. The last time this sentence was inflicted, was upon a ship-master, who, to save his landed property from the clutches of the law, so that his wife and family should not starve after his death, remained mute.—*Pump Court.*

"FROM," MEANING OF.—"From" is *prima facie* an exclusive term, so that if in a contract any right is to continue under it for a certain period "from" a given day, that day is to be excluded, but the term is not so unambiguously exclusive as not to be susceptible of an inclusive construction if there be anything in the context to show that an inclusive meaning was intended by the parties. Such is the effect of *Pugh* v. *The Duke of Leeds*, 2 Cowp., 714, and *Wilkinson* v. *Gaston*, 9 Q.B., 137, in both of which cases "from" was construed as inclusive; but in the curious case of *The South Staffordshire Tramways Company* v. *The Sickness and Accident Association* (Notes of Cases, p. 127), Mr. Justice Day and Mr. Justice Lawrence, though differing on another point, agreed in the opinion that there was nothing in the context of the contract before them to show an inclusive meaning to be put upon the term. The contract was one of assurance against accident "for twelve months, from November 24, 1887," and an accident within the meaning of the policy happened on November 24, 1888. Here there was clearly nothing in the context to avoid the operation of the ordinary rule, and the judgment on this point is indisputably correct. On a much more difficult point, whether an accident to forty persons was forty accidents or one, the judges were equally divided, and Mr. Justice Lawrence, as junior judge, withdrew his judgment. We cannot help thinking the accident was but a single one, but, looking to the large amount in dispute, the case, which must in any event go to the Court of Appeal, will in all probability be taken to the House of Lords.—*Law Journal.*

THE October number of *The Law Quarterly Review*, edited by Sir Frederick Pollock, Professor of Jurisprudence in the University of Oxford, comes to us laden, as usual, with good things. The leading articles are as follows: "The Law of Criminal Conspiracy in England and Ireland"; "The Bourgoise Case in London and Paris"; "The Compulsion of Subjects to Leave the Realm"; "Remoteness and Perpetuity"; "Tinkering Company Law"; "Difficulties of Abstract Jurisprudence"; "Gifts of Chattels without Delivery"; together with the usual very able and interesting notes on points of law too numerous to mention. We copy some of them for the benefit of our readers. We note the remarks of the editor, when calling attention to the stricture of a contemporary, that these notes

"are nearly all on cases." He thus replies: "It is quite true—as true as that we do not profess to offer an excellent substitute for the comic weeklies. We had supposed, and shall continue to suppose, until we have much better reason to the contrary, that most English-speaking lawyers would rather have notes on the points of current cases than remarks on things in general, or stale professional gossip. The same paragraph says that 'students of legal science are becoming fewer every year.' We do not know on what facts this statement is founded. It is certainly not so at the Universities."

"THINK of the state of the record," said Parke B. when it was proposed to allow amendment of pleadings. We smile, but it would be wrong to put down such an utterance of the grand old judge to a perverse preference for technicality over justice. He, like others, firmly believed that the interests of justice were best served by a strict adherence to technical rules. We have travelled fast and far since then, as Lord Coleridge points out, and among the most salutary changes have been not only the almost unrestricted power of amending at any stage, but the Court's power of curing irregularities and defects, and so getting at the merits. *Eddowes* v, *Argentine Loan Agency* (38 W.R. 629) is an instance. An affidavit had been sworn before a British Consul abroad, but it omitted the words "before me" in the jurat. It was clear that it had been sworn before the Consul, because there were alterations all through it initialed by him, but it was strenuously contended that the Court must reject it on the authority of *Reg.* v. *Bloxham* (6 Q.B. 528); *Graham* v. *Ingleby* (1 Ex. 651,) etc. Such cases there are; and a "vast amount of expense and injustice," as Lindley, L.J., said, "has been caused by rejecting affidavits like this by reason of some defect or omission by some clerk or official;" but the Court is now empowered to deal with such defects (O. 38, s. 14), and *Reg.* v. *Bloxham*, etc., survive only to furnish us with complacent reflections on the narrow-mindedness of our forefathers, and our superior enlightenment.—*Law Quarterly.*

"THE name of a firm," as Wood, V.C., said in *Churton* v. *Douglas* (Johns 189), "is a very important part of the good-will of the business;" one might go farther and say the most important part, for while partners come and go, the name remains. As such it passes with the good-will to an assignee, but the right to use the name is for the purpose of showing that the business is that formerly carried on by the assignor; it does not entitle the assignee of the business, so Stirling, J., has decided in *Thynne* v. *Shove* (59 L.J., Ch. 509), to use the name so as to expose the assignor to liability by holding him out as the real owner of the business: thus the purchaser of a baker's business must not distribute trade cards with the vendor's name upon them as baker and confectioner. If he does so, the vendor may get an injunction, but he will not get his costs if there is no evidence that he has really been subjected to any liability. If the vendors are a firm, and the dissolution has been duly advertised, and notice given to customers, the use of the vendors' name cannot give rise to any liability (*Newsome* v. *Coles*, 2 Camp. 617), and an injunction ought to be refused (*Levy* v. *Walker*, 10 Ch. Div. 436). In

America they manage better. A man who has bought a business is, in some States, only allowed to describe himself as successor. In others he may use the name of his predecessor, but only with his written consent.—*Ib.*

"No attorney," says Abbott, C.J. (*Montriou* v. *Jeffreys*, 2 C. & P. 113), "is bound to know all the law. God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law, or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into." But a solicitor is bound to know some things, and one of them is that the County Court is, generally speaking, a cheaper forum than the High Court. When a local board, for instance, wants to recover £34 from a frontager, and is advised to sue in the Lancaster Palatine Court and loses and has to pay the defendant £240 in costs, it is naturally grieved at having to pay its solicitor another £200, and may be excused for charging negligence (*Barker* v. *Fleetwood Improvement Commissioners*, 62 L.T.R. 831). "The cases," says Charles, J., "seem to me to establish that where a solicitor recommends his client to sue in a Court that has jurisdiction over the matter in question, but where the client may incur a penalty as to costs, even if successful, the solicitor may be held to have been guilty of negligence if he has not advised his client as to the risk he runs of incurring the penalty;" but if there happens to be no penalty (as in the Lancaster Palatine Court) for bringing an action in a more expensive Court when he might have brought it in a cheaper, the client it seems has no remedy. Why? If he loses, as in *Barker* v. *Fleetwood Improvement Commissioners*, he has to pay perhaps ten times the amount in costs, because his solicitor has taken him into the more expensive Court. Of course a solicitor may have many proper reasons for doing so: then there is no negligence, but the criterion of penalty or not seems, from the client's point of view, unsatisfactory.—*Ib.*

LORD CAMPBELL much preferred judge-made law to the "crude enactments of the legislature." Lord Coleridge, on the other hand, like Lord Westbury, thinks statute law would be very tolerable but for the cases: so various, as Herodotus would say, are the opinions of men even on the commonest matters. Strange to say, this dictum of the Lord Chief Justice was called forth by the much-abused Bills of Sale Acts. Anyhow we may be thankful that in *Read* v. *Joannon* (25 Q.B.D. 300) the trumpet gave no uncertain sound, and that debentures have not been drawn into the terrible vortex of the Bills of Sale Acts. Whether a "covering deed," including chattels, must still be registered as a bill of sale is not quite clear (see *Ross* v. *Army and Navy Hotel*, 34 Ch. Div. 43), but probably it need not. *Re Pyle Works* (44 Ch. Div. 534) affirms the right of a company to charge its uncalled capital. Uncalled capital is part of a company's property, and there is nothing in the Companies' Act, or in principle, to prevent a company, if its articles authorise it, charging it like any other property. The sections and cases disallowing set-off on winding up were cited in argument as if they appropriated uncalled capital to creditors. The fallacy is transparent. On a winding up they

do; before winding up general creditors have no lien whatever. It may seem like a hardship on creditors that the only fund they can look to should be forestalled. The answer is, this is the meaning of "limited liability." If creditors take the trouble they can always find out what they are trusting to.—*Ib.*

"WHAT is your proposition of law?" the late Lord Justice James would say to a counsel who was bungling his opening with a confused statement of facts. "What is your proposition of law?" the distracted reader of the Chancery Law Reports might well exclaim in coming upon the portentous head-note of nearly two pages of small print to *Sheffield Building Society* v. *Aizlewood* (44 Ch. D. 412), and the exclamation might be repeated in a "crescendo" of despair as case after case met his eye with nearly a page of head-note. An epitome of a case is not, as the editors of the Law Reports seem to think, a head-note at all. A head-note is or should be the key to the case, the clue of legal principle which we can follow as we progress through the intricacies of the report. On the clearness, conciseness, and accuracy of the head-note the value of the report very much, if not mainly, depends. It is therefore a great pity that more pains are not taken by those responsible for the Law Reports to give the "legal pith" of the decision and no more. The latest Law Reports Digest, it is only fair to say, shows a marked improvement both in brevity and arrangement.—*Ib.*

Reviews and Notices of Books

A Digest of the Criminal Law of Canada. By G. W. Burbidge, A.B., D.C.L. Toronto: Carswell & Co., 1890.

This work has now been some months before the profession, and it has therefore in a measure established its own reputation as a valuable addition to the as yet scanty library of Canadian law books. It is based on Stephen's Digest of the Criminal Law of England, and follows the plan there adopted. The work is well done, after a good model, and so we have an excellent codification of our criminal law. The reference to Canadian statutes and cases will greatly assist the practitioner. It is to be regretted that others of our bar, who have a special knowledge of some particular branch of the law, do not see their way to follow the lead of the few who have already published in book-form the law as at present construed by our courts. We have nothing but words of commendation to those who thus endeavor to discharge a duty they owe to their profession; and nothing but praise for the excellent compilation now before us.

The Law of Collateral Inheritance, Legacy, and Succession Taxes. By B. F. Dos Passos. New York: L. K. Strouse & Co., 1890.

A logical treatise on the law of succession taxes in the United States, as applied in the nine States of the Union where it has been adopted, with reasons in favor of such a tax being imposed, and embracing the United States and many English decisions.

DIARY FOR DECEMBER.

1. Mon..... Princess of Wales born, 1844.
2. Tues.....General Sessions and County Court Sittings for Trial in York.
4. Thur.....Chancery Division High Court of Justice sits.
6. Sat.....Michaelmas Term and High Court of Justice sitting ends.
7. Sun.....*2nd Sunday in Advent.* Sir W. Campbell, 6th C.J. of Q.B., 1825.
9. Tues.....General Sessions and County Court Sittings for Trial, except in York.
14. Sun.....*3rd Sunday in Advent.* Prince Albert died, 1861.
17. Wed.....First Lower Canadian Parliament met, 1792.
18. Thur.....Slavery abolished in the United States, 1862.
21. Sun.....*4th Sunday in Advent.* St. Thomas. Shortest day.
24. Wed.....Christmas Vacation begins.
25. Thur.....Christmas Day. Sir M. Hale died, 1676, æt. 67.
26. Fri.....St. Stephen.
27. Sat.....J. G. Spragge, 3rd Chan., 1869.
28. Sun.....*1st Sunday after Christmas.* Innocents' Day.
30. Tues.....Holt, C.J., born, 1642.

Reports.

ONTARIO.

DITCHES AND WATERCOURSES ACT.

RE CURTIN, APPELLANT, AND TAYLOR, RESPONDENT.

Scale of costs—Maps and surveys.

The costs of a map and survey cannot be taxed against an unsuccessful respondent.

[WHITBY, Nov. 15.

The appellant herein, having succeeded in setting aside the award of the engineer, with costs against the respondent, filed the usual affidavit of disbursements, claiming therein the sum of $17.00 as being paid to a surveyor, in addition to his fees as a professional witness; which sum of $17.00 the clerk disallowed, and this was an appeal from his ruling.

N. F. Paterson, Q.C., for appellant.

T. W. Chapple, for respondent.

DARTNELL, J.J. The clerk is right. Sec. 27 of the Ditches and Watercourses Act, R.S.O., chap. 220, provides that "the fees to witnesses . . . shall be the same as those allowed to witnesses . . . in the Division Court." It is true that in the Superior and County Courts, by Rule 1213, the taxing officer can allow for maps or plans when the necessity of them is shown to him, and that they were used at the trial; but this rule cannot be taken as adding another item to the Division Court tariff. In this, as well as similar cases before me under the Act, the map was unnecessarily elaborate and expensive.

Appeal disallowed.

HEALY, APPELLANT, AND MCDONALD, RESPONDENT.

Maintaining Ditches—Benefit to the lands—Inferior and superior owners.

Unless there is a preponderating benefit to the land through which it is necessary to construct or maintain a ditch for the benefit of the superior owner, the inferior owner should not be required so to construct or maintain it, where it is shown that any possible benefit to his land is counterbalanced by the inconvenience or nature of its location; and an award was amended to accord with this view.

[WHITBY, Nov. 24.

Through Healy's land, from east to west, was situated a well-defined natural drain or watercourse. McDonald's land lay to the south; and in order to drain a portion thereof, it became necessary to open a ditch northerly through Healy's land, until the natural watercourse was reached. This, by an award of the township engineer, made in March, 1884, was permitted to be done by McDonald at his own expense. A new award, by a different engineer, and which is the subject of this appeal, directed that th ditch should in future be deepened and maintained by Healy.

N. F. Paterson, Q.C., for the appellant.

J. McCosh, for the respondent.

DARTNELL, JJ. The award in question is, in fact, a reversal of the former award, in a matter of considerable importance to the appellant. There does not appear to be any new circumstances which would justify the change, and certainly none enuring to his benefit. On the contrary, from the raising of the waters of Lake Simcoe, more than the usual quantity of water backs up on Healy's land, and the additional volume of water from McDonald's land would tend further to increase the flooding. There was some evidence that the drain in question might benefit a small portion of Healy's land; but, on the other hand, it was shown that by reason of its "zig-zag" course, it would inconveniently divide the field through which it passes. It is to be recollected that the Act is in derogation of common law rights, and it must therefore not be construed to the detriment of one, who,

but for its operation, has no obligation imposed upon him.

The construction or maintenance of a ditch or drain, for the benefit of another, should not be imposed upon any one, unless a decided and preponderating benefit is the natural consequence. I think it is the duty of the engineer to weigh the disadvantages against the advantages, and only charge a duty upon an unwilling owner when he is clearly and considerably to be benefited by the work, The present award is, in fact, a reversal of that made by the former engineer, and I am fortified by his opinion. I can find no circumstances which justify any change, but rather the contrary. This award must be amended by restoring the parties to the position they formerly occupied, and the appeal is allowed with costs.

Early Notes of Canadian Cases.

EXCHEQUER COURT OF CANADA.

BURBIDGE, J.]

THE ST. CATHARINES MILLING AND LUMBER CO. ET AL *v.* THE QUEEN.

Dominion Lands—Permit to cut timber—Implied warranty of title—Breach of contract to issue license.

1. A permit issued under the authority of the Minister of the Interior, under which the purchaser has the right within a year to cut from the Crown domain a million feet of lumber, is a contract for the sale of personal chattels, and such a sale ordinarily implies a warranty of title on the part of the vendor; but if it appears from the facts and circumstances that the vendor did not intend to assert ownership, but only to transfer such interest as he had in the thing sold, there is no warranty.

2. The Government of Canada, by Order-in-Council, authorized the issue of the usual license to the company (suppliants) to cut timber upon the Crown domain, upon certain conditions therein mentioned. The company did not comply with such conditions; but before the expiry of the year during which such license might have been taken out, proceedings were commenced by the Government of Ontario against the company, under which it was claimed that the title to the lands covered by the license was vested in the Crown for the use of the Province of Ontario, and that contention was ultimately sustained by the Court of last resort.

Held, that there was a failure of consideration which entitled the company to recover the ground rent paid in advance on the Government's promise to issue such license.

Quære: Will an action by petition or on reference lie in the Exchequer Court against the Crown for unliquidated damages for breach of warranty implied in a sale of personal chattels?

BURBIDGE, J.]

THE VACUUM OIL CO. *v.* THE QUEEN.

"*The Customs Act, 1883*," *ss. 68, 69, 198, 207—Money deposited in lieu of seizure—Market value—Waiver of notice of claim—Penalties—Prescription.*

1. The company (suppliants) were manufacturers of oils, doing business at Rochester, New York. Their principal business in the United States was done directly with the consumer. For several years they did business from their office at Rochester directly with Canadian consumers. In some cases the purchaser paid the duty, and in others the company sold at a price including the duty and the cost of transportation. In the former case they charged the Canadian purchaser the price to consumers at their place of business in Rochester, and the oils were so invoiced and the duty paid on that value by the purchaser. In the latter case, the price to the consumer at Rochester was taken as a basis upon which the price per gallon to the Canadian purchaser was made up, but the goods were entered for duty at a lower value—two sets of invoices being used, one for the purchaser in Canada, and the other for the company's broker at the port of entry.

Held, that the oils were undervalued.

2. The company having changed their manner of doing business in Canada, and having established a warehouse at Montreal, which became the centre and distributing point of their Canadian business, exported oils from Rochester to Montreal in wholesale lots. The invoices

showed a price which was not below the fair market value of such oils when sold at wholesale for home consumption in the principal markets of the United States.

Held, that there was no undervaluation.

3. When goods are procured by purchase in the ordinary course of business and not under any exceptional circumstances, an invoice disclosing truly the transaction affords the best evidence of the value of such goods for duty. In such a case the cost to him who buys the goods abroad is, as a general rule, assumed to indicate the actual market value thereof. It is presumed that he buys at the ordinary market value. It is not the value at the manufactory, or the place of production, but the value in the principal markets of the country, *i.e.*, the price there paid by consumers or dealers to dealers that should govern. Such value for duty must be ascertained by reference to the fair market value of such or like goods when sold in like quantity or condition for home consumption in the principal markets of the country whence so imported.

4. Goods seized for fraudulent undervaluation were released upon a deposit of money. The importer made no claim by notice in writing under the 198th section of "The Customs Act, 1883," but there was no question that he claimed the goods. Subsequently he submitted evidence to show there was no ground for the seizure, and the Minister having considered such evidence, and having heard the parties, acquitted the importer of the charge of fraudulent undervaluation, but found there had been an undervaluation of these and other goods. No proceedings were taken to condemn the goods within the three years mentioned in section 207 of "The Customs Act of 1883." On petition to recover the money deposit, it was

Held, that the Minister had waived the notice of claim required by section 198 of the said Act.

Quære: Does section 198 apply to the case where money is deposited in lieu of goods seized?

5. The additional duty of 50% on the true duty payable for undervaluation under section 102 of the Customs Act of 1883 is a debt due to Her Majesty, which is not barred by the three years prescription contained in section 207, but may be recovered at any time in a court of competent jurisdiction.

Quære: Is such additional duty a penalty?

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Chancery Division.

BOYD, C.] [Nov. 1.

RE GRAYDON *v.* HAMMILL.

Contact of sale—Incumbrances—Local improvement rate—Sewers—Vendor and purchaser.

Where parties had contracted in writing, the one with the other, to sell to each other certain lands free from incumbrances,

Held, that though the contract also provided that taxes were to be proportioned and allowed to date of completion of sale, special frontage rates imposed for local improvements and construction of sewers prior to the contract, the period of which had not expired, were incumbrances to be discharged by the vendors respectively.

A. Cassels for vendor.

Marsh, Q.C., contra.

FERGUSON, J.] [Oct. 4.

SMITH *v.* TENNANT.

Contract—Conveyance—Merger of contract in conveyance.

The plaintiff agreed in writing to give certain lands of his for five houses of one, for whom the defendant was assignee for creditors, which were in course of erection on S. avenue. By the contract, which was dated March 24th, these five houses were to be completed by May 30th, similar to certain houses on O. street. Mutual conveyances were to be exchanged between the parties within sixty days, *i.e.*, by May 24th, and as a matter of fact they were executed and exchanged about May 9th.

The plaintiff claimed damages for non-completion of and defects in the finishing of the five houses on S. avenue.

The deed from the defendant contained no covenants covering the matter complained of.

Held, that nevertheless the plaintiff was, on the original contract, entitled to recover.

It was impossible to arrive fairly at the conclusion that a contract to perform certain work,

or to do a certain thing, for the benefit of the other contracting party, at a period after the time fixed by the same agreement for the execution and final delivery of the formal conveyances, became merged in the conveyance.

FERGUSON, J.] [Nov. 18.

SMITH *v.* BROWN.

Mortgagor and mortgagee—Sale under power—Notice of sale—Demand of payment within a month—Advertising sale during the month—Injunction—R.S.O., c. 102, s. 30.

An advertisement for sale of lands is a "proceeding" within the meaning of the words "no further proceedings" in s. 30 of R.S.O., c. 102.

Where a mortgagee served upon the mortgagor a notice demanding payment of the mortgage money, and stating that unless payment were made within a month from the service the mortgagee would proceed to sell, an injunction was granted restraining the mortgagee from publishing until after the expiry of the month an advertisement of the sale of the mortgaged premises.

A. Abbott for plaintiff.

J. A. Paterson for defendants.

ROSE, J.] [Nov. 8.

HALL *v.* HALL.

Donatio mortis causa—Delivery of keys of box and rooms containing valuables.

Shortly before his death the plaintiff's uncle delivered to her his watch and pocket-book, and also the keys of his cash-box, then in the actual possession of his solicitor, and of two rooms, in which were contained securities for money and chattels. He accompanied the delivery with words of gift.

Held, upon the evidence, that the deceased intended to give to the plaintiff what the keys placed in her control, and to part with the possession and dominion of the cash-box and its contents, and of the rooms and their contents; and upon the law, that the intention of the deceased should be given effect to, and a valid *donatio mortis causa* declared.

C. G. Snider for plaintiff.

Bicknell for defendants.

Flotsam and Jetsam.

A WILL of about 1830 has this clause: "I leave to my widow the sum of five hundred pounds"; but adds the clause, that she is only to come into the *enjoyment* of it after her death, in order "that she may be buried suitably as my widow."

A JUDGE AS A PREACHER.—The novel sight of a judge of the Criminal and Civil Courts of the City of London preaching to an open-air congregation was witnessed in the churchyard of St. Botolph, Aldersgate street. During the dinner hour, from a quarter past 1 to 2 p.m., and before an attendance of fully one thousand, the Common-Serjeant, Sir William T. Charley, Q.C., delivered an earnest discourse.

A YOUNG counsel, practising before Lord Ellenborough, was beginning to recite a long speech, when his memory failed him. "My lord," said he, "the unfortunate client, who appears by me—my lord, my unfortunate client —" The Lord Chief Justice interfered, and in a gruff voice said, "You may go on, sir; so far the Court is quite with you."

MR. JUSTICE MAULE once addressed a prisoner at a county assize in the following words:. "Prisoner at the bar, your counsel thinks you innocent; I think you innocent; but a jury of your own countrymen, in the exercise of such common sense as they possess, which does not appear to be much, have found you guilty, and it remains that I should pass upon you the sentence of the law. That sentence is that you be kept in imprisonment for one day and as that day was yesterday, you may go about your business." The unfortunate rustic, rather scared, went about his business, but thought that law was an uncommonly puzzling thing.—*Pump Court.*

LORD BROUGHAM said, in the House of Lords, that he remembered a case wherein Lord Eldon referred it in succession to three chief courts below to decide what a particular document was. The Court of King's Bench decided it was a lease in fee; the Common Pleas, that it was a lease in tail; the Exchequer, that it was a lease for years. Whereupon Lord Eldon, when it came back to him, decided for himself that it was no lease at all.

THE following notice to the profession is extracted from a New Jersey paper of 1821 : "To be sold, on the 8th July, one hundred and thirty-one suits at law, the property of an eminent attorney about to retire from business. (Note —The clients are rich and obstinate)."

EXCITED FEMALE.—"Say, if you have filed them divorce papers for me, I want you to go around and stop 'em right away."

Lawyer.—"Have you made it up with him?"

Excited female.—"Lord, no. I don't have to. He has just been run over by a train. I want you to sue the company for damages."—*Express.*

MANY of the "good things" which almost unconsciously drop from the lips of one of our learned Chief Justices at Osgoode Hall are unhappily lost in oblivion, or perhaps survive for a time only in the memory of those who happen to hear them. Here is a *mot* of his which, we think, deserves a more enduring fate. Speaking of the Act enabling county court judges to officiate in other counties than their own, he duly observed : "It is very hard on the people of a county to have a judge coming among them whose law they are not accustomed to." This may be a little hard on some of our judicial friends in country places, but they will excuse our inserting a joke at their expense. Have none of them some pleasant rejoinder? The same learned Chief Justice dearly loves a joke. One does not often get inside his armor ; but he would not object to be pierced by an unpoisoned shaft neatly inserted.

Law Society of Upper Canada.

THE LAW SCHOOL, 1890.

LEGAL EDUCATION COMMITTEE.

CHARLES MOSS, Q.C., *Chairman.*

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W. R. MEREDITH, Q.C.	N. KINGSMILL, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers:
- E. D. ARMOUR, Q.C.
- A. H. MARSH, B.A. LL.B. Q.C.
- R. E. KINGSFORD, M.A. LL.B.
- P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum:

FIRST YEAR.

Contracts.

Smith on Contracts.

Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.

Kerr's Student's Blackstone, books 1 and 3.

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.

Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.

Leith & Smith's Blackstone.

Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.

Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.

Hawkins on Wills.

Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.

Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.

Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.

Smith's Mercantile Law.

Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p.m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

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The Canada Law Journal.

VOL. XXVI. DECEMBER 31, 1890. NO. 20.

AMONG considerations known to the law as "illegal" is that of consenting to stifle a prosecution for a criminal offence. An agreement founded on such a consideration cannot be specifically enforced, as may be seen from the late case of *Windhill Local Board* v. *Vint*, 63 L.T.N.S., 366. There the defendants in the course of working a quarry obstructed a public highway. The plaintiffs indicted the defendants for committing a nuisance, but before the case was tried agreed to a compromise, whereby the defendants agreed to restore the highway within a limited time, and the plaintiffs agreed that the indictment during such time should lie in the office, and that upon the work being completed they would consent to a verdict of "not guilty" on the indictment. The highway not having been restored, the plaintiffs brought the action to enforce the specific performance of the compromise. Cotton, L.J., lays down that the reason of the illegality of such considerations is this, that the Court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution *when the offence is an injury to the public.* It will be observed that he confines the rule to cases of injury to the public. *McClatchie* v. *Haslam.* 63 L.T.N.S., 376, however, was a case where the plaintiff had been induced to give a mortgage on her property to secure money misappropriated by her husband—in order to avert a prosecution of her husband for embezzlement. Although no agreement was made to stay the prosecution, and though no actual threat was used by the defendants, yet Kekewich, J., held that this being the sole motive in the plaintiff's mind for entering into the transaction, it was invalid and must be cancelled, which certainly seems going a long way.

THE recent decision of the English Court of Appeal in *Eddowes* v. *The Argentine Loan Co.*, 63 L.T.N.S., 364, appears somewhat to qualify the cases in our own courts of *Cunningham* v. *Lyster*, 13 Gr., 575, and *Clendennan* v. *Grant*, 10 P.R., 593, the principle of which has been followed in many other cases which are not reported. In *Cunningham* v. *Lyster* the Court of Chancery decided that an accommodation indorser was entitled to file a bill against the holder, and maker of the note, to compel the latter to pay it, and relief was granted by directing the maker to pay the amount of the note into Court, to be applied in payment of the note. In that case the plaintiff himself had not paid the note and *non constat* that

he would ever be called upon to do so. The bill merely alleged that the holder neglected and refused to proceed against the maker for its recovery. No objection appears to have been raised by the maker as to the plaintiff's right to bring the action. It was therefore virtually the case of a plaintiff enforcing a contract of indemnity before he had suffered damage, and the same was the case in *Clendennan* v. *Grant*. In the latter case, however, a suit had been brought against the surety, but he had not paid the debt. In *Eddowes* v. *The Argentine Loan Co.*, the contract was to indemnify a firm carrying on business in the Argentine Republic, against a certain claim. The claimants had recovered judgment in respect of this claim in England against the firm, but it had no assets in England, and before it could be enforced an action would have to be brought in the Argentine Republic. The plaintiff claimed that the surety should be ordered to pay off the English judgment—but the Court of Appeal held that the plaintiff thus far had not suffered any damage, and having no property in England was not in any danger of being damaged by the English judgment, and therefore they dismissed the action.

By the retirement of Lord Justice Cotton from the Bench in consequence of ill-health, the English Court of Appeal has lost one of its most conspicuous ornaments. At this distance we can only speak of the retired judge as he has put himself *en evidence* on the pages of the law reports. We cannot speak of those personal qualities apart from intellectual ability, which are so necessary to the satisfactory discharge of the judicial functions, and which can only be properly appreciated by actual experience of them. Judging from the reports, however, we cannot fail to recognize in the retired judge one who possesses a judicial grasp of the principles of law of the highest order, and his grasp of those principles is no less noteworthy than the facility with which he applied them. Few can read his clear exposition of facts, and notice the directness with which he was able at once to seize the crucial point of a case, without recognizing in him a master mind. In the possession of such men as James, Jessel, Cotton, and Brett, the English Court of Appeal has been singularly fortunate, and its decisions, as a rule, have commanded the highest respect. The graceful and entirely heartfelt eulogy passed on the retiring judge, both by Lord Esher, on behalf of the Court of Appeal, and by Sir Richard Webster, on behalf of the Bar, are pleasant reading to all who have the welfare of the profession at heart, and indicate not only the high esteem, but the warm affection with which the retiring judge was regarded. Such expressions of good will and appreciation men seldom live to hear themselves, it is generally only when they are dead and buried that their contemporaries give utterance to such sentiments. The cause of the learned Lord Justice's retirement is to be deplored, and it is to be hoped that a respite from the labors of the bench may enable him yet to enjoy many years of life. Mr. Justice Kay, we see, is promoted to the Court of Appeal, and Mr. Romer, Q.C., succeeds Mr. Justice Kay.

THE LAND TITLES ACT.

The pamphlet edition of the Land Titles Act, issued by the Ontario Government in 1887 having become exhausted, it was necessary to issue another, and the Master of Titles has availed himself of the occasion to incorporate with the main Act the provisions of subsequent Acts. In a little volume entitled, "The Land Titles Act as amended by subsequent Acts, with new rules and tariff of fees," these are inserted in their proper places, within brackets.

It has also been deemed advisable to consolidate the rules appended to the Act in the Revised Statutes and those of February, 1889, with a number of additional provisions, which the experience of the offices of Land Titles has shown to be required. This has accordingly been done in a body of new rules, seventy-nine in all, passed by the Lieut.-Governor in Council on 14th Nov. last, which supersede all former rules. These new rules, with a revised tariff and some additional forms, are published in this volume. Foot-notes are appended refering from the statutory provisions to the related rules and forms, and *vice versa*.

Among the most important of the new rules we notice the following: Rule 16 which gives the Master authority to require parties to proceed with their applications, under the penalty of their being treated as withdrawn. Rule 22 provides for the withdrawal of cautions. Rule 36 simplifies the method of placing a notice of a lease, or an agreement for a lease on the register. Rule 45 abolishes the restriction as to the number of persons who may be registered as owners of any parcel of land. A form of application for a notice to terminate a caution and one for the withdrawal of a caution are also given.

By the new tariff several changes are made, and we are glad to see they are in the line of lessening the fees. One of the most important of these is a reduction in the charge for examination of the title deeds. Under the former tariff this was fifty cents for each instrument examined when the property was worth $1000, and thirty cents when the value was under $1000. The charge is now thirty cents when the value is $2000, and twenty cents when it is under this amount. Certainly these fees are not extravagant. This change will considerably decrease the expense of bringing lands under the Act, but the decrease which would tell most is that which would be obtained by dispensing with advertisements in all ordinary cases. Private parties purchase without advertising, and we do not think the claims on the assurance fund would be alarmingly increased if the Master of Titles were authorized to adopt a like practice. We believe the advertising sometimes costs nearly as much as the charges in the Master's office. Certificates of ownership have been reduced from $2 to $1. On the other hand, the charges for registering long instruments have been increased. Where the document is not more than ten folios, the fee remains as heretofore, namely, $2 for registration, including searches as to title and for executions, when made at the time of registration, and also including the entry of a charge, or partial transfer, upon the land certificate. Where, however, the instrument with affidavits exceeds ten folios a charge of ten cents for each additional folio is now authorized. We suppose this change has been

made on account of the recent tendency to introduce long and special provisions into mortgages. The decisions on the Short Form Mortgage Act make some additions necessary, but the length of the mortgage forms used by some loan companies and a few private lenders is simply appalling. The fee of registering a transfer of a charge is reduced from $2 to $1. If more charges than one are transferred by the same instrument fifty cents is to be paid for each additional charge. As most transfers include one charge this is a very considerate reduction.

This publication, for which we are indebted to our most efficient and courteous Master of Titles, will be found extremely useful to the increasing number who have business in the Land Titles offices. The success which has attended this system in this country cannot be remarked upon without at the same time remembering how much of this success is due to the manner in which the Act has been administered by Mr. Scott.

COMMENTS ON CURRENT ENGLISH DECISIONS.

PRACTICE—CONSENT ORDER—WITHDRAWAL OF CONSENT.

In *Lewis's* v. *Lewis*, 45 Chy. D., 281, counsel for the plaintiff, assuming to carry out a compromise which had been agreed to by his client, consented to an order. Before the order was drawn up the plaintiff's solicitors discovered that the minutes of the order which had been consented to, did not properly carry out the agreement to which the plaintiff had assented, and an application was then made to withdraw the consent, which Kekewich, J., allowed to be done; holding that the case differed from *Matthews* v. *Munster*, 20 Q.B.D., 141, where the compromise had been agreed to by counsel by virtue of his inherent authority, and not in pursuance of instructions, as in this case, and as to which he was of opinion there had been a misunderstanding.

PRACTICE—DISCOVERY—DOCUMENTS OF TITLE—PRIVILEGE—AFFIDAVIT ON PRODUCTION, CONCLUSIVENESS OF.

Morris v. *Edwards*, 14 App. Cas., 309 (which is noted *ante* vol. 25, p. 520), although only a practice case, has nevertheless arrived at the House of Lords. Their lordships held (affirming the Court of Appeal) that the defendant's affidavit of documents was sufficient in stating that the documents objected to be produced related solely to his own title, and did not tend to prove or support the plaintiff's title, and it was unnecessary to allege that they did not impeach the defence; and also that a contentious affidavit was inadmissible to contradict the defendant's affidavit. This point ought now to be set at rest.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT TO BORROW—LIABILITY OF PRINCIPAL WHERE AGENT EXCEEDS HIS AUTHORITY.

Montaignac v. *Shitta*, 15 App. Cas., 357, is a decision of the Privy Council on the law of principal and agent, the question being whether a principal was bound by the act of his agent where the agent had acted in excess of his authority. The action was brought to recover a loan made by the plaintiff to the defendants through their agent, and the defendants claimed that the agent had exceeded his authority in agreeing to the terms and rate of interest on which the money was

advanced. The agent had, under his power of attorney, implied power to borrow money for the purpose of carrying on his principal's business, and their lordships were of opinion that this implied power, under circumstances of emergency, must be deemed to include power to borrow on exceptional terms, outside the ordinary course of business, and that a lender was not bound to inquire whether the emergency had arisen or not, but was entitled to recover from the principal, sums advanced *bona fide* without notice that the agent was exceeding his authority.

PRACTICE—VERDICT IN PURSUANCE OF AWARD—COSTS—APPORTIONMENT OF COSTS.

In *O'Rourke* v. *The Commissioners of Railways*, 15 App. Cas., 371, the Privy Council, following *Duke of Buccleuch* v. *Metropolitan Board of Works*, 1 H.L.C, 418, held that where a case is referred to arbitration by a consent order, and the arbitrators are directed to return a general award on the whole declaration for a sum certain, and such award is thereby directed to be entered as a verdict whereon final judgment may be signed, and the costs of the action, reference, and award, are directed to abide the result—and an award is thereupon rendered for the plaintiffs for part of their claim, carrying costs—it is not open to the court to give the defendant judgment in respect of the residue of the sum claimed, and then direct the taxing-officer to ascertain, by the evidence of the arbitrators and others, what parts of the plaintiffs' claim the defendant had succeeded on, with a view to the apportionment of the costs, because evidence on that point would be inadmissible as tending to explain or contradict the award.

ABSOLUTE CONVEYANCE CLAIMED TO BE A MORTGAGE—EVIDENCE TO CONTRADICT DEED.

Barton v. *Bank of New South Wales*, 15 App. Cas., 379, was an appeal to the Privy Council in a case in which the plaintiff claimed that a deed, though absolute in form, was intended to be a mortgage. The circumstances of the case were that William Barton, who died in 1881, had in 1869 borrowed from the defendants £600, and had deposited, as security for the loan, the title deeds of three parcels of land. In 1874 the debt and interest being then £723 odd, he executed an absolute conveyance of the three parcels to the defendants, in which the fact of the loan was recited, the amount due, and that the deed was made in satisfaction of £400 of the debt. What was attempted to be relied on as showing that the deed was intended to be a mortgage was a correspondence which had subsequently taken place between the parties, in which some equivocal expressions had been used, and some entries in the defendant's books of account, and the neglect to credit the £400 to the borrower's credit; but these, in the opinion of their lordships, were wholly insufficient to establish the plaintiff's contention, especially as the explanation of the bank's omission to credit the £400 had been excluded, on an objection taken by the plaintiff

STOPPAGE IN TRANSITU—DELIVERY TO CARRIER—DURATION OF TRANSITUS.

In *Lyons* v. *Hoffnung*, 15 App. Cas., 391, the Judicial Committee has added the weight of its authority in support of the soundness of the rule of law laid down by the Court of Appeal in *Bethell* v. *Clark*, 20 Q.B.D., 615 (see *ante* vol. 24, p. 293). In that case Lord Esher, M.R., stated the rule to be, that "when the goods have not been delivered to the purchaser, or to any agent of his to hold for

him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu* and may be stopped." This is to be understood as limited to the case of goods delivered to a carrier for the purpose of being carried to a place *indicated at the time of sale*, and does not extend to cases where the goods are delivered to a carrier or agent, not for the purpose of being carried to a destination indicated at the time of sale, but to be held subject to the orders of the buyer; in which case the transit would, as far as the vendor is concerned, end with the delivery to the agent.

STATUTORY BODY, LIABILITY OF FOR NON-FEASANCE—DAMAGES.

In *The Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas., 400, the question is discussed as to the extent to which statutory bodies are liable for nonfeasance. The Judicial Committee, following the principles laid down by the House of Lords in *Mersey Docks* v. *Gibbs*, L.R., 1 H.L., 93, determined that the liability of such bodies is governed by the statute which creates them; that the powers conferred when executed at all must be executed with due care; and in the absence of a contrary intention appearing by the statute creating them, such bodies and their funds are rendered subject to the same liabilities as the general law would impose on a private person doing the same thing. But in the case of mere non-feasance no claim for reparation will lie, except at the instance of a person who can show that the statute under which the body is created imposed a duty towards himself, which they negligently failed to perform. The injury complained of in the present case arose from the fall of an overhanging road, consequent upon the giving way of its retaining wall, which the corporation was under a statutory duty to maintain merely for the purposes of road conservancy, and it appeared that the result was due to the original defects in the structure of the wall, and that the corporation was not negligently ignorant thereof, and not guilty of misfeasance; and it was held that, according to the true construction of the ordinance constituting the corporation, it was vested with administrative powers subject to the control of the Government, and that there was no intention to render it responsible to the plaintiffs for the injury complained of.

COLLISION—DAMAGES—DEMURRAGE.

In *The City of Peking* v. *Compagnie des Messageries*, 15 App. Cas., 438, was an action to recover damages for a collision. The plaintiffs claimed to recover damage for the period their vessel was detained, owing to the collision; and it was held by the Privy Council that such claim could only be maintained for actual expenses incurred for the detained vessel, such as lodging, maintenance, and wages, of the crew; but not for the profits which the injured vessel might have earned, where, as in this case, another vessel, belonging to the same owners, had, at the defendants' expense and indemnity for loss occasioned by the substitution, been doing the work the injured vessel would have done if not disabled. From this it would appear that where loss of profits are claimed by reason of demurrage, there must be an actual loss, and the mere detention unaccompanied by any actual loss does not afford any ground for such a claim.

Notes on Exchanges and Legal Scrap Book.

DETECTION OF MURDER BY MICRO-PHOTOGRAPHY.—During last month the ever-courteous Sir John Thompson, Minister of Justice, granted an audience to Dr. Richard Wicksteed, of the Law Department of the House of Commons, and Mr. H. N. Topley, Photographer to the Department of the Interior. The object of the interviewers was to ask the Minister to authorize the purchase of Photomicrographic apparatus for the public service of Canada. Dr. Wicksteed said that his attention as a jurist had been attracted by the account, in *The British Journal of Photography*, of the successful reproduction of the image on the retina of the eye of an insect, by photographic experts, at Vienna. Reports of similar feats had been published previously, but apparently these reports were fables. If evidence were procurable from the photographed image of the last object seen by murdered persons,—say for instance the girls at Cumberland,—what invaluable evidence it would be. He also drew attention to an article on the detection of forgery by similar apparatus, published in THE CANADA LAW JOURNAL of the 15th November *(ante* p. 557). The Minister then read the notes from Vienna appearing in *The British Journal of Photography*, which runs as follows:—

"It does not very often happen to us to have to record a greater triumph in the application of photography to scientific purposes than has recently been chronicled from Vienna. Professors Dr. J. M. Eder, Ritter von Reisinger, and Dr. Sigmund Exner have succeeded—and thoroughly too—in photographing the visual image on the retina of a beetle. The apparatus employed was the large micro-photographic installation by Zeiss, and the beetle, whose devotion to the advancement of science cost him his life, was a male of the species *Lampyris splendidula*, the females having eyes that are far less perfect in construction. The eye was cut out, the pigment removed from the back, and immersed on a plate of mica in a solution of glycerine diluted until its index of refraction equalled that of the blood of the beetle. The object of the experiment was not only to obtain a photograph of the retina, but also to enable an opinion of the sharpness of sight of the beetle to be formed. One of the windows of the chemical lecture theatre of the Photographic Institute overlooks the neighbouring house tops, giving an excellent view of the Schottenfield church and church tower. The windows were shut, and on one of the panes was pasted the letter R cut out in paper, and against this window the eye of the deceased fly was directed, and the resulting retinal image was fixed upon an Angerer bromide plate by means of a Zeiss apochromatic, and a projection eye-piece. Collotype reproductions of the negative have been supplied to the readers of the *Photographische Correspondenz*, and enable an accurate idea to be formed of what the beetle actually sees. In it the panels of the window are distinctly and clearly visible, as is also the letter R. The distant church appeared as of less importance in the beetle's eye, but was nevertheless distinctly visible. How it occurs that the eye of the insect, with its hundred facets, succeeds in producing upon the retina so clear and distinct a single image, still remains as wonderful as before; but, as the first permanent and indisputable record of what a beetle actually sees, we venture to think that this successful experiment of Messrs. Eder, Reisinger, and Exner is likely to become classical."

Mr. Topley then explained the photographic details of the process. He said, further, that almost every Department at Washington possessed apparatus such as he now applied for—of this he was personally cognizant, having studied for some months in that city the refinements of photography. He wished to make

his department as complete as possible. Such a photomicrographic apparatus would cost about $250.00. It would be invaluable to the Departments of Justice, the Interior, the Geological survey, the Customs, Inland Revenue, and Secretary of State. Sir John Thompson appeared deeply interested in the subject, and authorized the purchase of the apparatus.

Reviews and Notices of Books

The Bills of Exchange Act, 1890, *being a Codification of the Law-Merchant Respecting Bills of Exchange, Cheques, and Promissory Notes, with Explanatory Notes and Illustrations from Canadian, English, and American Decisions.* By Thomas Hodgins, M.A., one of Her Majesty's Counsel. Toronto: Rowsell & Hutchison, 1890.

Mr. Hodgins has deserved well of the profession by the promptitude with which he has brought out his work on the Bills of Exchange Act passed in the last session of the Dominion Parliament. The passing of this Act marks a new point of departure in the law of Bills and Notes which had, heretofore, rested mainly, though of course not exclusively, on the mercantile usage as interpreted by judicial decisions. The new Act, while making some important changes, as, for instance, the introduction of the system of crossed cheques, is chiefly remarkable as being practically a codification of the existing law on its subject. It is, of course, too much to hope that the tangled and thorny wilderness of "case-law" has been entirely levelled and cleared by this one trenchant stroke of the legislative axe, but there is no room for doubt that it has done considerable execution in this way, and that a decided step had been taken towards the goal indicated in our author's happily chosen Ciceronian motto, and the happy era when "one and the same law will prevail amongst all nations and at all times."

Mr. Hodgins' book begins by an interesting and instructive introduction, in which he traces the origin and history of the various kinds of negotiable securities, and indicates their leading characteristics, and the principal variations which are incident to their use in different countries. Then follows the Act itself, accompanied by an ample apparatus of notes and illustrations, designed to bring out with all necessary fullness the meaning of the text, and to explain its bearing and application by a copious citation of English and American authorities, as well as the decisions of our own courts. Great labor has evidently been bestowed upon the work, which, we are satisfied, will be found of the greatest assistance to the profession when called on to deal with the constantly recurring questions coming up in practice under the Act.

It could scarcely be expected that a work so extensive, involving so much patient labor, and produced with such rapidity, should be free from errors, and we feel it incumbent upon us to refer to a few points in which the author's views seem open to question. We had intended to call attention to what we consider an error on p. 57 (fourth line from the top), where the book, as we had it, stated

that a "bill payable on presentation" would include a "bill payable on sight," and that such bills (*i.e.*, bills payable on sight), "are not entitled to 'days of grace.'" We learn, however, that the author has corrected this error in a small list of *corrigenda*, which has just been issued, so that his statement is now to the effect that sight bills "may be" entitled to days of grace. We think, however, that a stronger statement still would be justifiable, viz., that *such bills are* so entitled. Then again on p. 129 (note 3 to sec. 30), the author refers to the present statutory provisions against usury in Ontario and Quebec as being set out in R.S.C., c. 127, s.s. 10 and 11, not noting the fact that these provisions have been repealed by 53 Vict. (Dom.), cap. 34, sec. 2. This, however, is explained by the fact that the statutes of 53 Vict., were not issued till about the time the work came from the press, and so the effect of cap. 34 escaped notice. On p. 56, the case of *Howland* v. *Jennings*, 11 U.C.C.P. 272, is quoted as an authority for the proposition that "interest is recoverable on a note at the rate specified in it till payment," but that case has been distinctly overruled by the much later one of *Dalby* v *Humphrey*, 37 U.C.R., 514, in which it was held that in such cases interest after the day named for payment is in the nature of damages, and the rate is in the discretion of the Court or jury. Errors are unavoidable in any work of equal extent and composed under similar conditions to the volume before us; they will no doubt be corrected in future editions of Mr. Hodgins' book, and do not seriously impair its value as a full, painstaking, and generally accurate statement and elucidation of the important branch of law with which it deals. The index is good, and we notice that the author gives a convenient separation in the table of cases cited, giving them under the country to which they belong. We cannot speak with unstinted praise of the proof-reader's work. Dante would, with difficulty, recognize his compatriots under the guise of "Gibelius" (p. 3); the title of "indefeasable" (p. 1) to its penultimate vowel does not appear to us "indefeasible;" there is an unfortunate vacillation between "juridical" and "juridicial" on p. 61, and "transfered" and "transferer" on p. 131 are, like the succulent oyster, all the worse for dropping an "r." It may be objected that to such matters the maxim *de minimis* applies, but if the law cares not for such things, a critic, even in a law journal, cannot wholly disregard them. If this book were not likely to be a standard work on the subject of bills and notes in this country we might not perhaps have been so particular in pointing out these minor matters.

In view of the importance and value of the work, we are tempted to regret also that the publishers did not use larger type in the notes. The work is so valuable and so full of meat that it is entitled to larger display. It is much more exhaustive than a cursory glance would indicate. There are some 1370 cases cited, and we should judge they have also been carefully examined, as we notice that in very many cases the head notes have been carefully condensed, showing that no labor has been spared by the learned author. We trust he will soon be called upon for a second edition, which, doubtless, will be free from blemishes incident to necessarily hurried preparation and prompt production, and which will more suitably and conveniently present the mass of information collected in its pages.

A Handbook for Magistrates in relation to Summary Convictions and Orders and Indictable Offences. By Hon. Thomas H. McGuire, one of the Justices of the Supreme Court of the N.W. Territories. Carswell & Co., Toronto, 1890.

This little work, in 100 pp., was written, as the learned author explains in his preface, as a plain and simple guide to Magistrates in their duties under the Acts relating to Summary Convictions and Indictable Offences.

After a brief introduction, indicating the source of the authority of a Justice of the Peace, the volume is divided into two parts; Part I. dealing with summary matters, and Part II. with indictable offences.

Part I., amongst other matters, points out how jurisdiction is conferred: gives practical instructions for preparing the information; indicates the number of Justices necessary; what may be done by one alone; defines when a summons or a warrant should be issued to secure the attendance of the defendant; treats of evidence, how witnesses may be compelled to attend, who are competent, the number required, rules for taking it, cross-examination, and lays down the procedure if defendant fails to appear; whilst Part II. gives equally minute instructions in regard to the procedure where the Magistrate's duty is limited to an inquiry whether the person charged before them should be required to stand his trial before some higher tribunal.

It will be seen from the above outline that the matter treated of is of great practical importance. A perusal of the book justifies the statement that it will be found very useful not only to Justices themselves, but to members of the legal profession. In a narrow compass a large amount of information is afforded.

The author's chief merit is perspicuity. Wherever possible, a synopsis is given of the law upon any point, in tabular form. As an instance of his method, at p. 20 under the head of "Number of Witnesses" he says: "As a rule one witness is sufficient, but in the following cases such evidence must be corroborated by other legal evidence: (1) Perjury; (2) Seduction, R.S.C., ch. 157, s. 6; (3) Forgery, if the witness is the person interested in respect of the forged document, ch. 174, s. 218; (4) Procuring feigned marriages, ch. 161, s. 2; (5) Treason, requiring two witnesses; (6) Where young children are permitted to give evidence without being sworn, ch. 37, s. 13 (1890)."

At the beginning of the work a number of charts or maps are prefixed, conveying information as to modes of procedure at a glance.

The language used throughout the volume is as free from technical expressions as possible, and as Magistrates rarely have the Reports accessible, there are but few references to authorities.

The work would seem to fill a long felt want, and will doubtless find a ready sale as soon as its value becomes generally known.

DIARY FOR DECEMBER.

1. Mon..... Princess of Wales born, 1844.
2. Tues.....General Sessions and County Court Sittings for Trial in York.
4. Thur.....Chancery Division High Court of Justice sits.
6. Sat.....Michaelmas Term and High Court of Justice sitting ends.
7. Sun.....*2nd Sunday in Advent.* Sir W. Campbell, 6th C.J. of Q.B., 1825.
9. Tues.....General Sessions and County Court Sittings for Trial, except in York.
14. Sun.....*3rd Sunday in Advent.* Prince Albert died, 1861.
17. Wed.....First Lower Canadian Parliament met, 1792.
18. Thur.....Slavery abolished in the United States, 1862.
21. Sun.....*4th Sunday in Advent.* St. Thomas. Shortest day.
24. Wed.....Christmas Vacation begins.
25. Thur.....Christmas Day. Sir M. Hale died, 1676, æt. 67.
26. Fri.....St. Stephen.
27. Sat.....J. G. Spragge, 3rd Chan., 1869.
28. Sun.....*1st Sunday after Christmas.* Innocents' Day.
30. Tues.....Holt, C.J., born, 1642.

Reports.

ONTARIO.

EXTRADITION CASE.

IN RE PARKER.

Extradition—Discharge under Habeas Corpus—Re-arrest—Jurisdiction of County Judge.

The prisoner, accused of forgery in the United States, fled to Ontario, and was committed for extradition by a County judge, but was discharged on *habeas corpus* for a defect in the proceedings. On a new information before another County judge it was objected that the judge of another county had no jurisdiction and could not interfere, and that as the prisoner had already been discharged on another warrant, he could not be re-arrested.

***Held*, 1. That the jurisdiction of a County judge is under R.S.O., cap. 142, s. 5, co-extensive with that of a judge of the Superior Court.**

2. That as the County judge (before whom the prisoner was lately brought) was acting under the Extradition Act he was not barred by a previous discharge under a *habeas corpus*.

[St. Thomas, Aug. 26, 1890.

In this case the prisoner was a fugitive from justice from the State of Kansas, the charge against him being that of forgery. He was found in the county of Middlesex, and was committed for extradition by the Junior Judge of that county; but, on account of some defect in the proceedings (see 19 Ont. Rep. 612), he was discharged upon *habeas corpus*. A new information was then formulated upon the same facts and submitted to the Senior and Junior Judges of the County of Middlesex, who, however, declined to issue another warrant, thinking they were barred by the provisions of the *habeas corpus* Act, 31 Car., cap. 2. The same information was subsequently produced before the judge of the county of Elgin, and a warrant applied for, which was granted.

On the prisoner being brought before the judge of the county of Elgin the same charge as had previously been made was investigated upon fresh evidence, and the defect in the former evidence supplied. Objection was taken on behalf of the prisoner to the jurisdiction of the County judge, on the ground that the case belonged to the county of Middlesex, in which the prisoner was found, and that he had already been charged with the same crime upon the same facts, with the exception that the promissory note, the alleged forged instrument, was now produced; and, amongst a number of other grounds, it was urged that under the *habeas corpus* Act a man could not be arrested after discharge thereunder.

McKillop for the State of Kansas.

R. M. Meredith for the prisoner.

HUGHES, Co. J.:—

The extradition judge is the only authority in this province to inaugurate proceedings under the treaty. His acts are ancillary to the proper and legal exercise of jurisdiction over the accused, and the offences alleged against him by the foreign tribunal alone competent to deal with him; so that whatever acts, whether judicial or magisterial here are necessary, are ancillary to and in aid of the court in the country where the alleged offence was committed, and whence the accused has fled, for without his intervention the foreign tribunal would be shorn of its power to do justice in the case.

In view of the objection to my jurisdiction in this matter, I must observe: (1) That under the fifth section of the Act it is co-extensive with that of the judges of the superior courts of and limited only by the bounds of the Province—and not by those of the county of Elgin, and every county judge has, for the purposes of the Act, all powers and jurisdiction of any judge or magistrate of the Province. (2) That it is not a bar to my acting in the case that the prisoner has been discharged by *habeas corpus* since I issued the warrant against him under the Extradition Act.

I am unable to suppose that if this had been an accusation of murder, committed in the State of Kansas, instead of forgery, the provisions of the treaty would be set aside or governed or controlled by our local or domestic laws, affecting the liberty of the subject, merely because

the accused had been discharged, either by an extradition judge or upon a writ of *habeas corpus*, for some or any defect in the proceedings in this country; either that the person who issued the first warrant had no jurisdiction or that there was some defect in the preliminary proof or proceedings, or that the warrant or order upon which he stood committed was invalid, or that the person had purged away the offence or crime by a failure in proof upon the preliminary enquiry, or that the discharge upon the *habeas corpus* is a bar to any subsequent arrest.

The principle contended for by counsel here, "*Nemo bis vexari pro una et eadem causa*," can only be held to have application where there has been a trial, and a final conviction or acquittal upon that trial; or where there has been an accusation in one form of indictment and disposed of by a legal termination, and the person accused by another form on the same facts, or where a statute provides a bar to further proceedings.

My acting in this capacity under the treaty and the Extradition Act, is simply and purely ancillary—in aid of the foreign court to which jurisdiction of trying this prisoner, and pronouncing upon the crimes alleged against him belongs—there is no power to try either the offence or the offender here, and a murderer or a convict for any crime named in or covered by the treaty (according to my judgment) does not purge his crime by a discharge upon *habeas corpus*. It would be contrary to the polity of the governments who are parties to the treaty, and of international law. We might harbor malefactors to any extent if such were held to be the case, contrary to the comity and object of the treaty. I hold that the treaty, being of international arrangement and concern, must be upheld and carried out to all reasonable intendment, and that it overrides all previously existing domestic laws to the contrary.

Although it is true the practice under the treaty is governed by our mode of conducting preliminary enquiries, as a matter of procedure, still the principle which applies to cases submitted to a grand jury in this country, where, if a bill of indictment be ignored in a charge for a criminal offence—upon which a prisoner is confined in gaol—there is nothing, although he be discharged from custody, in the fact of ignoring the bill, to prevent the accusation being taken up, on a subsequent occasion, by another grand jury, at some future sittings of a court of competent jurisdiction, and of a bill of indictment being found for the same offence. The ignoring of the bill on the first indictment and the discharge of the accused from gaol, is no bar to the second accusation, nor would it purge the offence in any way.

The statute of Charles does not apply to a person accused of a crime committed in a foreign country—it only applies to cases of commitment on a criminal charge for an offence against the domestic law of this country. Nothing could justify the arrest of a foreigner—who has sought an asylum here, as a fugitive from foreign justice for a criminal offence alleged to have been committed abroad—in the absence of a treaty justifying such a proceeding—in *Rex* v. *Mackintosh*, 1 Stra., 308, it was held that the statute of Charles did not apply to a person committed for treason done in Scotland, because the courts will not act under the statute in the case of a person charged with a crime committed abroad.

Under the existing treaty with the United States, and the Extradition Act, the judges who perform judicial acts ancillary to the tribunals of the United States within the convention must be treated as should those tribunals themselves, in order to promote the purposes for which those tribunals exist, their acts are in the interest of promoting civilization by the detection, prevention, and punishment of crime, and to hold that the former discharge upon *habeas corpus* by a single judge would be to oust the foreign tribunal of its jurisdiction over the offence; or to suppose that the domestic law of this province would allow a fugitive from a foreign land, who has sought an asylum here, to purge his offence committed in the foreign land, no matter how heinous it might be, would be to turn the treaty into a failure and a delusion, and as said by KENT, C.J., "The statute never intended such a destruction of principle as to entrust to a judge, in vacation, the power to control the judgment or check the jurisdiction of a court of record," and it is not the policy of the high contracting parties to the existing treaty, that the criminals of either country should be covert or couchant in the country of the other.

I therefore find that the prisoner, John Wesley Parker, is a fugitive from justice from Coffee County in the State of Kansas, accused there of the crimes hereinbefore enumerated and referred

to, with intent to defraud, as set forth in the information filed with me, and I must therefore order him to be held for such crimes so committed,and issue my warrant for his committal to the common gaol of the county of Elgin (being the nearest convenient prison) there to remain until surrendered to the State of Kansas, or to the United States of America, or discharged according to law.

And here, as my further duty under the 12th Section of the Extradition Act is, I inform the prisoner that he will not be surrendered until after the expiration of fifteen days, and that he has the right to apply for a writ of *habeas corpus*.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Full Ct.] [Nov. 26.

REGINA *v.* RAY.

Criminal law—Bigamy—Proof of first marriage.

Upon an indictment for bigamy, the first marriage must be strictly proved as a marriage *de jure*.

Evidence of a confession by the prisoner of his first marriage, is not evidence upon which he can be convicted.

J. R. Cartwright, Q.C., for the Crown.

Lyman Lee, for the prisoner.

[Nov. 26

REGINA *v.* DAY.

Criminal law—Statements of prisoner to detectives—Admissibility of evidence.

During the trial of the prisoner for murder, questions arose as to the admissibility in evidence of statements made by the prisoner to certain detectives, in answer to questions put to him by the detectives, the prisoner being at the time in the custody of the detectives.

Held, upon a case reserved, that the statements were admissible in evidence.

J. R. Cartwright, Q.C.. for the Crown.

Lennan for the prisoner.

Div'l Ct.] [Nov. 17.

MARTIN *v.* MCMULLEN.

Guaranty—Construction of—Limited suretyship for a floating balance—Payment of part of debt—Right to rank upon insolvent estate of principal debtor.

The plaintiff's testator gave the defendants a guaranty in the following terms : "In consideration of the goods sold by you on credit to M., and of any further goods which you may sell to M. upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called on in any event to pay a greater amount than $2,500."

The whole debt owing to the defendants by M., at the expiration of the period limited by the guaranty was $5,556. M. made an assignment for the benefit of his creditors. The plaintiff paid the defendants $2,500,and claimed to rank upon the estate of M. in respect thereof.

Held, STREET, J., dissenting, that the guaranty was a limited suretyship for a floating balance, and was to be construed as applicable to a part only of the debt, co-extensive with the amount of the guaranty ; and the plaintiff was entitled to a dividend from the estate of M. in respect of the $2,500 paid.

Judgment of STREET, J., 19 O.R. 230, reversed.

McCarthy, Q.C., for the plaintiff.

Gibbons, Q.C., for the defendants.

Div'l Ct.] [Nov. 17

MECHIAM *v.* HORNE.

Canada Temperance Act—Incorporation into, of ss. 62, 64, 66, 67, of R.S.C., c. 178—Distress, dispensing with—Imprisonment for costs of commitment and conveying to gaol—Warrant of commitment—Excess of jurisdiction—Police Magistrate—Summary conviction drawn up after Act ceased to be in force—Nullity—Conviction not quashed—Evidence of sufficient distress—Nonsuit.

The defendant was the salaried police magistrate for the County of Ontario, in which the Canada Temperance Act was in force prior to the 11th May, 1889, when the Order-in-Council declaring it in force was revoked.

On the 11th January, 1889, the plaintiff was convicted before the defendant of a second offence against the Act, and adjudged to pay a fine of $100 and $12.05 costs.

On the 20th March, 1889, the defendant issued a warrant of commitment, reciting the plaintiff's conviction before him and the imposition of the fine and costs; declaring that the plaintiff had no goods and chattels, and directing her committal to gaol for sixty days, "unless the said several sums and all the costs and charges of the said distress and of the commitment and conveying of the said Nellie Mechiam to the said common gaol, amounting to the further sum of seventy-five cents, and

shall be sooner paid unto you."

At the trial of an action for the arrest and imprisonment of the plaintiff under this commitment a conviction of the plaintiff was put in dated 11th January, 1889, but which was not drawn up till February, 1890. The conviction adjudged that the penalty and costs according to the adjudication, and if these sums were not paid forthwith, then, inasmuch as it had been made to appear that the plaintiff had no goods or chattels whereon to levy by distress, that she should be imprisoned for sixty days, unless these sums and the costs and charges of conveying to gaol should be sooner paid.

The conviction had not been quashed.

It appeared, by the examination of the defendant, that the seventy-five cents in the warrant was charged for the warrant, and that the blank was left for the constable to fill in the costs of conveying to gaol. The constable, however, did not fill in the costs, but endorsed a memorandum of them on the back of the warrant, making them $13.40.

Held, that the result of ss. 62, 64, 66, and 67, of R.S.C., c. 178, which are incorporated into the Canada Temperance Act, R.S.C., c. 106, by virtue of s. 107, is to enable the convicting magistrate to order the levy by distress of the penalty and costs, to dispense with such levy where he thinks it would be useless or ruinous, and to order the defendant to be imprisoned for a term not exceeding three months, unless the penalty and costs and also the costs and charges of the commitment and conveying to gaol are sooner paid.

Reg. v. *Doyle*, 12 O.R. 347, followed.

2. That although the warrant and commitment went beyond the conviction by directing a detention for the costs of the commitment, as well as of conveying to gaol, yet as the only sum for which the gaoler could lawfully have detained the plaintiff was the sum of seventy-five cents mentioned in the warrant, and the costs of conveying to gaol greatly exceeded that sum, there was no excess in the warrant.

3. That, as the only evidence given at the trial with regard to the defendant's appointment as police magistrate was quite consistent with his being in office at a salary under an appointment which did not expire with the Canada Temperance Act, it could not be said that the conviction drawn up in February, 1890, was a nullity.

4. That if the plaintiff was detained on account of the charges of the constable indorsed on the warrant, it was not the act of the defendant, for he never gave any authority to the constable to require the gaoler to detain the plaintiff for any sum not inserted in the warrant.

5. That as the conviction stated that it had been made to appear to the magistrate that there was no sufficient distress, and the conviction had not been quashed, evidence would not have been admissible to shew that there was sufficient distress.

6. That the commitment having been authorized by a lawful conviction, which had not been quashed, the plaintiff was properly non-suited.

Du Vernet for the plaintiff.

Farewell, Q.C., for the defendant.

STREET, J.] [Oct. 17

CARR *v.* CORFIELD.

Voluntary conveyance—Action to set aside—Fraudulent intent—Defeating creditors.

Fraudulent intention is a material element in an action to set aside a conveyance as being voluntary and fraudulent against creditors, and where it does not exist the action cannot succeed.

The fact that the result of a conveyance is to defeat creditors is not necessarily evidence that the intention of the grantor in making it was fraudulent.

Where another and a sufficient motive and reason for the conveyance was shewn, the action was dismissed.

Clute, Q.C., for the plaintiff.

Alcorn for the defendant Corfield.

Watson, Q.C., for the infant defendants.

Practice.

MACMAHON, J.] [Nov. 26.

ROSS *v.* BUCKE.

Pleading—Rules 384, 388, 389—Pleading and demurring without filing affidavit and without leave—Separate causes of action—Frivolous demurrer.

Where a statement of claim sets up in different paragraphs more than one cause of action, the defendant may, under Rule 384, plead to one and demur to another without filing the affidavit mentioned in Rule 388, or obtaining leave under Rule 389.

A demurrer to a claim for wrongful dismissal, which does not allege a hiring by the day, or week, or month, or otherwise, cannot be said to be frivolous.

D. Armour for the plaintiff.

M. G. Cameron for the defendants.

FERGUSON, J.] [Nov. 15.

WILLIAMS *v.* TOWNSHIP OF RALEIGH.

Consolidation of actions—Identity of issues—Application by common defendant in several actions.

Where the issues in several actions are not the same, there cannot be a consolidation of them.

Where several actions were brought against a municipal corporation by different plaintiffs for injuries to their respective lands occasioned by the alleged negligent construction by the defendants of several drains without providing a proper outlet for the waters brought down by such drains;

Held, that it was necessary for each plaintiff to prove that the negligent conduct of the defendants resulted in an injury to his own particular land; and, therefore, the issues in several actions were not the same; and this quite apart from the fact that, in any case, there would have to be separate assessments of damages.

Quære: Whether a common defendant can obtain a consolidation order against the will of the several plaintiffs.

Atkinson, Q.C., *J. M. Clark*, and *J. A. Walker*, for the plaintiffs.

M. Wilson, Q.C., for the defendants.

STREET, J.] [Nov. 29.

KNIGHT *v.* TOWN OF RIDGETOWN.

Notice of trial—Service by plaintiff on two defendants—Set aside on application of one—No notice to the other—Costs of the day.

Where there were two defendants and notice of trial was given by the plaintiff to both, and set aside upon the application of one, without notice to, or knowledge of, the other, who attended, with his witnesses, at the time and place named in the notice:

Held, that the defendant who moved against the notice of trial, was not bound to give the other defendant notice of the motion; that it was the duty of the plaintiff, if he desired to protect himself, to notify that defendant that the notice had been set aside, and therefore the plaintiff should pay the costs of the day.

Langton, Q.C., for the plaintiff.

Hoyles, Q.C., for the defendants, the Town of Ridgetown.

D. W. Saunders for the defendants, the C.S. R.W. Co.

BOYD, C.] [Nov. 17.

IN RE MACDONALD AND SULLIVAN.

Land Titles Act—R.S.O., c. 116, ss. 61, 62, 63—Caution—Cessation of—Security by registered owner.

Under s. 61 of the Land Titles Act, R.S.O., c. 116, a caution was registered against dealings by the registered owner, the cautioner claiming that the registered owner held as trustee for another, against whose lands the cautioner had an execution. An action had been brought for a declaration to that effect. The Master of Titles made an order that entry of the cessation of the caution should be made upon the registered owner, giving security for the amount claimed by the cautioner; that payment should be made according to the result of the pending action; and that until such entry should be made the caution was to continue to have effect.

Held, that the scheme of the Act contemplates such a course of proceeding, although it is not specifically provided for by ss. 62 and 63; and that, under the circumstances, the order was the simplest and most effective that could be made in the interests of all parties.

W. M. Douglas for the registered owner.

W. R. Smyth for the cautioner.

ROSE, J.] [Nov. 19.

MCBRIDE *v.* CARROLL.

Notice of trial—Mistake in date—Sufficiency of—Jury notice—Time—R.S.O., c. 44, s. 78, s.s. (2)—Non-jury sittings.

The plaintiffs on the 31st October, 1890, served notice of trial in these words: "Take notice of trial of this action at Osgoode Hall, at the Chancery Sittings, for the 17th day of October, 1890." A sittings of the High Court for trials, to be held by a Judge of the Chancery Division, at Osgoode Hall, had been fixed for the 17th November, 1890.

Held, that the notice was sufficient; for it gave such notice as imparted knowledge.

The sittings of the 17th November was not a jury sittings. On the 10th November, 1890, the defendant served a jury notice.

Held, that this notice was bad; for it was not served at least eight days before the sittings at which the action was to be tried, as required by R.S.O., c. 44. s. 78, s.s. (2).

A. Hoskin, Q.C., for the plaintiffs.

Neville for the defendant.

BOYD, C.] [Nov. 18.

CAMERON *v.* HEIGHS.

Married woman—Summary judgment—Separate estate—Untaxed bill of costs—Interest—Costs—Taxation—Retainer.

Summary proceedings upon specially endorsed writs do not apply where, the defendant being a married woman, the judgment can be only of a proprietary nature.

In the absence of a special agreement, interest cannot be recovered upon an untaxed bill of costs.

Where a solicitor sued a married woman and her husband upon an untaxed bill of costs, and, in default of appearance, signed judgment against both defendants personally for the amount of the bill with interest:

Held, that the judgment was irregular and might have been set aside with costs if the defendants had applied promptly; and, under the circumstances, the judgment was amended by limiting it as to the married woman to her separate estate, by disallowing interest, and by directing that the amount should abide the result of taxation, with leave to the husband to dispute the retainer.

C. W. Kerr for the plaintiff.

G. W. Bruce for the defendants.

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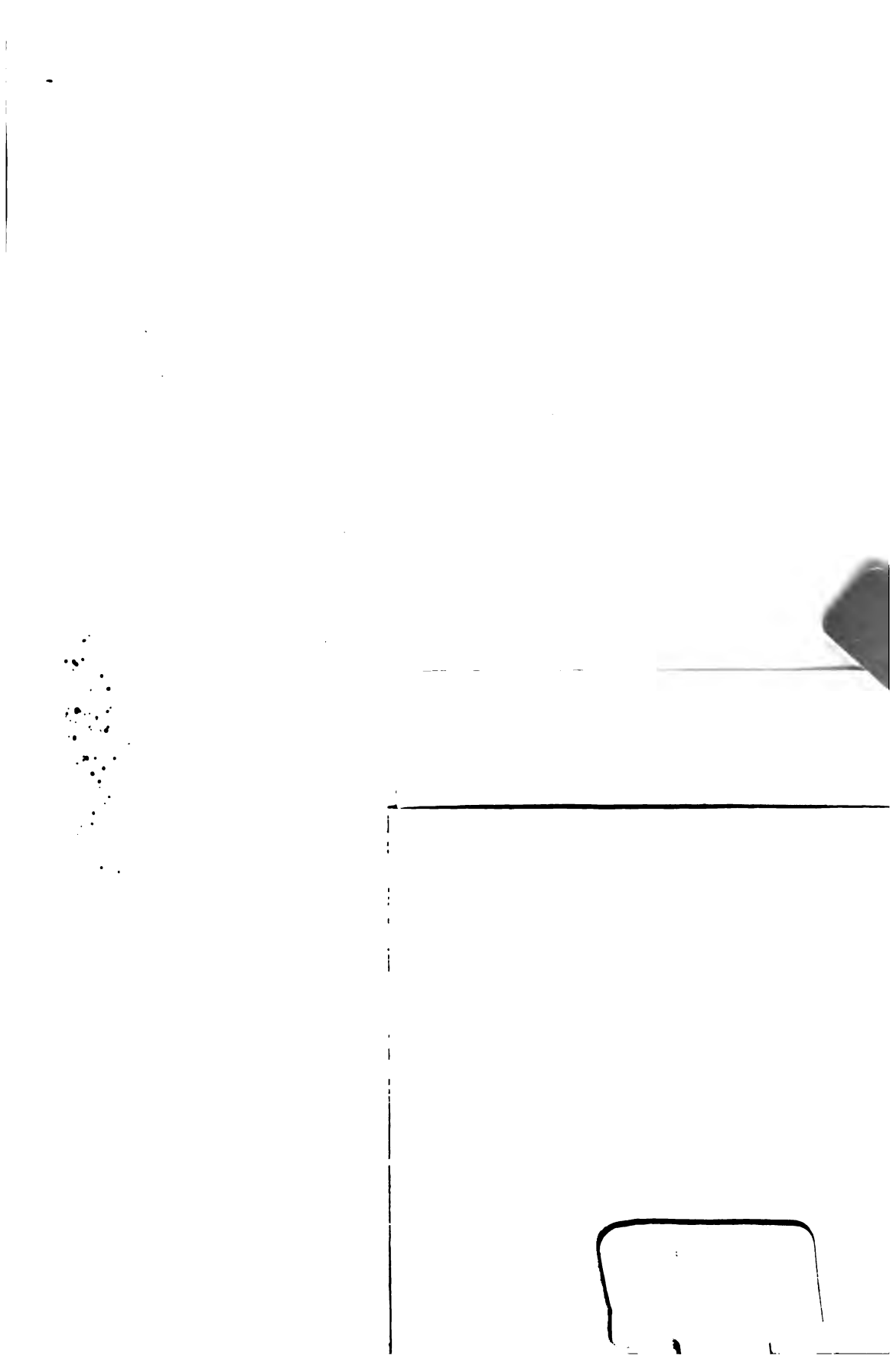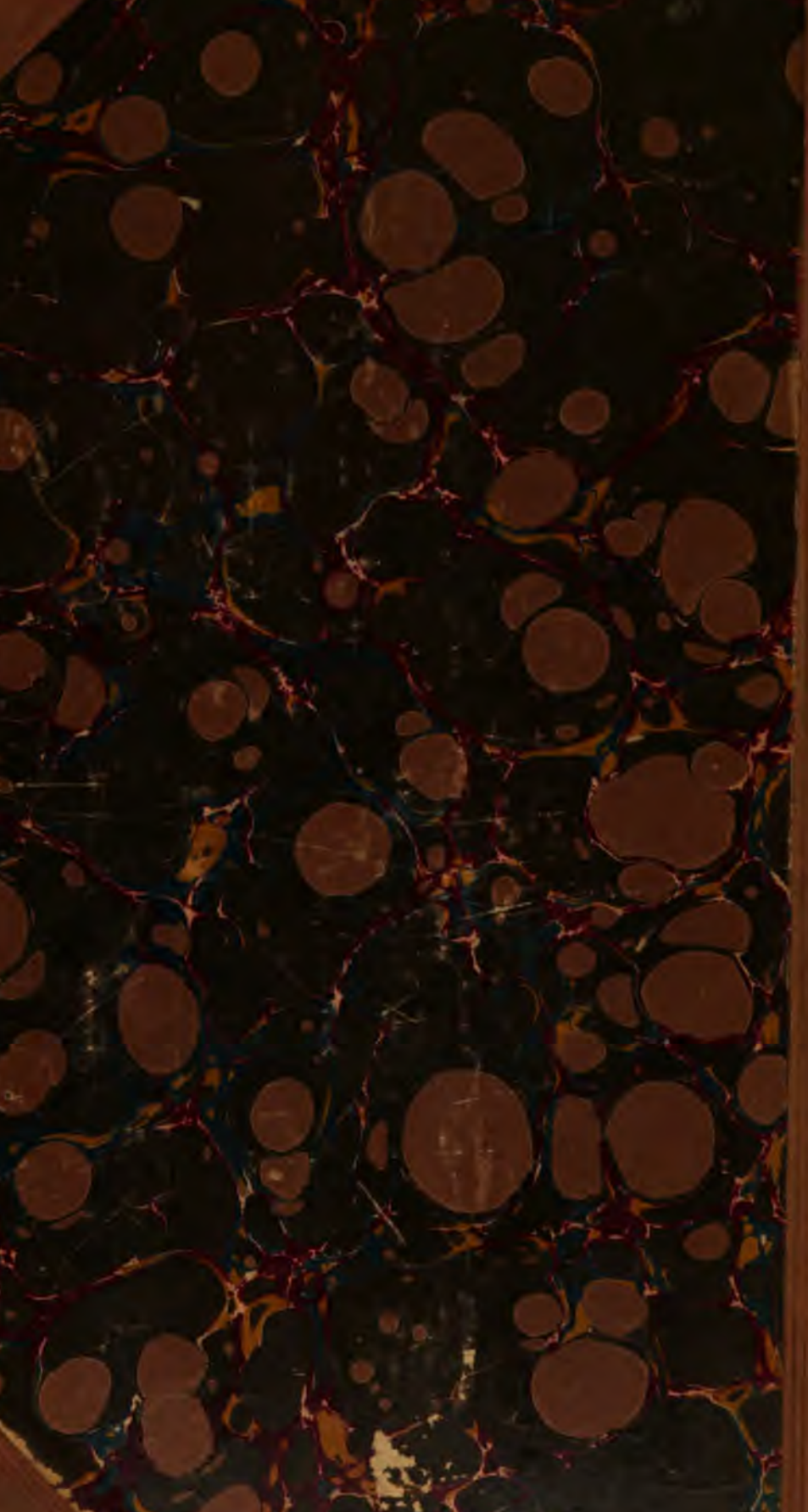
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